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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

LEWIS *v.* LEWIS.

1907
Oct. 18;
Nov. 4.

Probate — Unattached Papers forming Will — Identification — Execution— Acknowledgment and Attestation.

If it be clearly established by parol evidence that the pieces of paper propounded as a will were held together in some way and were so produced to the attesting witnesses and acknowledged by the testator as his will, and his signature thereon was shewn to them and declared by the testator to be his signature, the attestation of the document by the attesting witnesses in the presence of the testator renders it a duly executed will and entitles it to probate, although the pieces of paper were not attached by any mechanical fastening.

PROBATE SUIT.

The plaintiff Elizabeth Lewis, as the natural and lawful sister and only next of kin of David Lewis, late of Tynycwm, in the parish of Llangurig, in the county of Montgomery, farmer, deceased, claimed revocation of a grant of letters of administration, with, annexed thereto, the contents of one half-sheet of paper and so much of the contents of another half-sheet of paper as contained the name of the testator. This grant had been obtained by the plaintiff on June 7, 1905.

The defendants, who were legatees under the said will, denied that the deceased died intestate, set up the will, and asked the Court to pronounce in favour of it; and they also pleaded that the plaintiff was estopped from denying the due execution and validity of the said will.

The plaintiff, as to this last-mentioned plea, said in reply that she applied for the letters of administration with the will annexed under a mistake as to the circumstances of the alleged execution, and, further, that the grant was made under a misapprehension as to the true facts and circumstances of the alleged execution. The plaintiff further pleaded that the alleged will was written on two separate and distinct pieces of paper unattached to one another physically, or in any way connected with each other by reasonable inference or implication, and that neither of such pieces of paper was signed and attested so as to conform with the provisions of the Wills Act (1 Vict. c. 26), or its amending Act (15 & 16 Vict. c. 24).

The question of estoppel was not seriously pressed at the hearing.

The plaintiff was present at the execution of the document, and her evidence was taken, under an order of the Court, before an examiner. In her deposition she stated that at time of the alleged execution the first half-sheet alone was produced to the attesting witnesses.

It was admitted on all hands that both half-sheets were in the testator's handwriting, and that the testator did not sign in the presence of the witnesses.

The evidence of the two attesting witnesses was to the effect that the testator produced to them both half-sheets, which he held together by his finger and thumb, and that he said the papers were his will, and shewed them his name in the middle of the writing on the second half-sheet and acknowledged that as his signature. The witnesses then at the request of the testator, who still retained his hold on the two half-sheets, signed their names at the bottom of the first half-sheet.

BARGRAVE DEANE J. referred to the case of *In the Goods of Streatley.* (1)

Barnard, K.C. (*Gwynne Hall* with him), for the plaintiff. It was never intended by the testator, when he wrote on the second half-sheet, that his name, which appears in that writing, should be a signature at all or should operate as an execution of the first half-sheet. His intention was to begin a separate and independent document on the second half-sheet. The signature must be on the document which is put forward as the will. The defendants have not established by satisfactory and conclusive evidence that these two half-sheets were so connected at the time of the alleged execution as to constitute one testamentary document: *In the Goods of Gausden* (2); *Cook* v. *Lambert* (3); *In the Goods of West* (4); *In the Goods of Braddock.* (5)

Atkin, K.C. (*Griffith Jones* with him), for the defendants. The evidence goes to shew that the two half-sheets of paper constitute the will. The fact that no disposing part of the will appears immediately above the name of the deceased, which he acknowledged as his signature, is of no importance.

Cur. adv. vult.

1907. Nov. 4. BARGRAVE DEANE J. This is a probate action in which is propounded the will of David Lewis, who died on May 6, 1905, the will being dated April 17, 1905; but, according to the evidence of the witnesses, it was actually executed on April 30, 1905.

Administration, with the will annexed, was originally granted to Elizabeth Lewis; but she, thinking she would do better if the will were pronounced against, instituted the present action in December, 1906, to obtain revocation of the letters of administration, with the will annexed, which she had previously obtained on June 7, 1905.

On the other side it is alleged that this is a good will, and that the deceased was of sound disposing mind.

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(1) [1891] P. 172.

(2) (1863) 3 Sw. & Tr. 46.

(3) (1862) 2 Sw. & Tr. 362.

(4) (1863) 32 L. J. (P. & M.) 182.

(5) (1876) 1 P. D. 433.

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The will was on two half-sheets of paper, which have unfortunately been fastened together in the registry in such a way that it is not possible now to say whether the two half-sheets were pinned together or not before such fastening in the registry. It is said on behalf of the plaintiff that the two half-sheets were never annexed or fastened together by the testator, and that his signature on the second half-sheet was never intended by him to be the signature to his will.

The will is in Welsh, but the translation of it is as follows:—

"I am David Lewis, late of Tynycwm in the parish of Llangurig in the county of Montgomery. I by this writing make it known to all whom it may concern to know my will. I David Lewis send greeting: be it known to you all that I am the aforesaid of the above abode (farmer). On the consideration of love, good will, and the regard I have towards those whose names I will put down here" [then follow certain specific bequests].

At the bottom of that first half-sheet and opposite the word "witnesses" are the names of the attesting witnesses.

At the top of the second half-sheet there appear, entirely in the handwriting of the testator, written in Welsh, certain words, of which the following is the translation: "I David Lewis, late of" (&c.). "I make my will through this writing and make it known to all whom it may concern to know my will. Be it known to you . . . ."

That is all in the handwriting of the testator, including his name, "David Lewis."

The account given by the attesting witnesses is that they went to pay a visit to the testator, who, after talking to them for some time, asked them to do him a service. He thereupon went to a chest of drawers and took out a document which was folded. He kept it in his hand and never left go of it. He turned over the second half-sheet and pointed to his name, David Lewis, in the second part that I have read. He said that the document was his will, and, pointing to the words "David Lewis," said, "That is my signature." He then turned over to the first half-sheet and told them to sign their names as witnesses. This they did. I am satisfied that he did intend that to be the signature to his will, and that the witnesses attested it as such.

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It is not necessary that he should have written his name in their presence, if it was in fact there, in his own handwriting and declared by him to be his signature. He might have gone through the formality of going over the signature with a dry pen, and that might have been held a re-execution or acknowledgment according to some of the cases.

These two half-sheets are put forward as forming his will. In order to avoid fraud they must at the time of execution be attached in some way. It does not much matter if they should afterwards become detached. Here we have evidence by two witnesses, whom I see no reason to distrust, that at the time these two half-sheets of paper were put before them in the way I have mentioned the two pieces were held together for the moment by the testator's finger and thumb.

I am of opinion that this will was duly executed; that the two pieces of paper were held or fastened together at the time when it was executed; and that these two pieces of paper before me are the two pieces which the testator held together when he put them before the witnesses as his will, and acknowledged in their presence his signature to the document as his will.

The defendants have succeeded, and I pronounce for the will as contained on the first half-sheet and the signature "David Lewis" on the second half-sheet.

The defendants will take their costs out of the estate. There will be no order as to the plaintiff's costs.

Solicitors for plaintiff: *Woosnam & Smith, for Llewelyn Phillips, Llanidloes.*

Solicitors for defendants: *Philpot & Morrell, for A. J. Hughes, Aberystwyth.*

H. D. G.

NORMAN *v.* NORMAN.

1907
Oct. 30.

Divorce—Wife's Petition for Dissolution—Cruelty and Adultery—Previous Suit for Judicial Separation on Ground of same Cruelty—Deed of Separation—Covenant not to revive Suit—Subsequent Adultery by Husband.

A covenant by a wife in a deed of separation, to the effect that all proceedings in a suit which she had instituted against her husband on the ground of cruelty shall be stayed and that she "shall in no wise attempt to revive the same in any manner whatever":—

Held no bar to relief in a subsequent suit by the wife for dissolution of marriage on the ground of the husband's subsequent adultery coupled with the former cruelty.

Rose v. *Rose*, (1882) 7 P. D. 225; (1883) 8 P. D. 98, distinguished.

This was a petition by the wife, Mary Ann Norman, praying for the dissolution of her marriage on the grounds of cruelty and adultery of her husband William Norman.

The parties were married in 1876, and on January 5, 1899, the wife filed a petition for judicial separation on the ground of cruelty. The husband entered an appearance, but filed no answer, and terms were arranged.

On March 13, 1899, a deed of separation in pursuance of the terms was executed. This deed, after reciting unhappy differences and the institution of the suit for judicial separation, that alimony pending suit had been ordered at the rate of 15*s.* a week, and that the wife had lent the husband 200*l.*, which was still owing and which he had now agreed to repay to her "in full satisfaction of all claims for maintenance or alimony or otherwise," and also to hand over to her certain articles of furniture and to pay her costs as between solicitor and client of and incidental to and prior to the proceedings, contained the usual clauses for living apart in future, and covenants by the husband for payment of the 200*l.* and costs and delivery of the furniture to the wife. Then followed this clause—"that upon the said William Norman paying the said sum of 200*l.* and all the costs of the said Mary Ann Norman pursuant to the covenant in that behalf hereinbefore contained, *all further proceedings in the said suit* by the said Mary Ann Norman against the said William Norman *shall be stayed and that the said Mary Ann Norman shall*

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in no wise attempt to revive the same in any manner whatever." The deed also contained a provision for the wife to have the custody of the only daughter, aged nineteen, with access by the husband.

The husband subsequently committed adultery, and the present suit for dissolution of the marriage was instituted.

Harold Wright, for the respondent, took the preliminary objection that the deed was a final and effectual condonation of all the charges of cruelty, and that the wife was debarred, by the covenant which she had entered into, from setting up those charges in the present petition, they being identical with the charges of cruelty in the former suit. He relied on *Rose* v *Rose*. (1)

Bayford, for the petitioner. The case cited is distinguishable. There was a distinct covenant in that case that, in the event of any future misconduct, the cruelty was not to be revived. In the present case the wife covenanted not to revive the suit which was then or had been before the Court. It is the respondent's own conduct, subsequent to the date of the deed, which has revived the antecedent cruelty.

Harold Wright, in reply. The Court upheld the registrar's decision in the present case in refusing to order alimony pending suit, having regard to the terms of the deed. The covenant not to sue for further alimony is the same as in *Gandy* v. *Gandy*. (2)

Bayford, for the petitioner. It is not disputed that there was a refusal to order alimony, but Bucknill J. ordered security for costs to be given by the respondent in the present case.

BARGRAVE DEANE J. The only point raised here is that by reason of certain words in a deed the petitioner is not entitled to go into charges of cruelty before the date of the deed, and the case of *Rose* v. *Rose* (1) is relied upon. It is further said that the registrar made an order refusing to allow alimony pending suit, and that I upheld that decision of the registrar. I do not think, however, that this has anything to do with it. It is not the practice of the Court, where parties are separated under a deed, to allow either

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(1) 7 P. D. 225; affirmed, 8 P. D. 98.

(2) (1882) 7 P. D. 168.

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of them to proceed for alimony until it has been proved that something has happened apart from the offences mentioned in the deed.

It is not to be assumed that people have been guilty of adultery, and the deed remains in force until something fresh is proved. But the further question is: Can the wife now go into the charges of cruelty which were antecedent to the date of the deed? This case is not on all fours with *Rose* v. *Rose* (1), because that case expressly said that in no future proceedings should the antecedent charges be relied upon. That is not this case. This deed provides that, in consideration of the husband paying the wife 200*l.* which he owed her and also paying the costs as between solicitor and client, all further proceedings in that suit should be stayed.

That means: I have brought a suit and alleged cruelty. I withdraw that suit, and I undertake not to institute another suit on those charges of cruelty on your paying me a certain sum of money and costs. But there is nothing in the deed which says that no future proceedings shall be brought if there should be future misconduct.

It is the husband who, by his subsequent misconduct, as alleged, has revived these charges. It is his subsequent misconduct, if proved, which has done away with any previous condonation. Looking at the words of this deed, I am of opinion that the wife is not disentitled to allege now the previous charges of cruelty. I hold, therefore, that evidence of the cruelty antecedent to the date of the deed may now be given.

In the result a decree nisi was pronounced, with costs against the respondent.

Solicitor for respondent: *A. B. Sanders.*

Solicitors for petitioner: *Hulbert, Crowe & Hulbert.*

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(1) 7 P D. 225; affirmed, 8 P. D. 98.

H. D G.

[IN THE COURT OF APPEAL.]

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May 16;
Oct. 21, 22.

Admiralty—Ship—Collision—Sound Signals—Statutory Presumption of Fault —Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

A tug which, with a lighter in tow, was crossing the Humber under a slightly starboard helm on account of the ebb tide, starboarded further, and gave a long blast signal to indicate her presence to a steamship, under the stern of which she was passing. The steamship, which was shewing a stern light and lying athwart the river waiting to go into dock, came astern to allow another vessel to pass out of dock, and the tug thereupon hard-a-starboarded her helm to clear the stern of the steamship, but failed to give the appropriate two short blast signal required by art. 28 of the regulations for preventing collisions at sea as applied to the Humber. The steamship had no look-out aft, and, in the Court below, was found alone to blame for a collision with the lighter, whilst the tug was absolved from liability on the ground that the infringement of the rule could not by possibility have contributed to the collision:—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), that the tug was also to blame, for, though those in charge of the steamship were so negligently inattentive that they did not notice what was going on astern of them, it could not be said that, if the two short blast signal had been given by the tug when further starboarding or hard-a-starboarding, as an indication that she was manœuvring for them, the signal might not have been heard and acted upon by those in charge of the steamship in time to have avoided the collision with the lighter; and, therefore, the statutory presumption of fault arose under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894.

Appeal by plaintiffs, the owners of the steamship *Rijnstroom*, against a decision of Bucknill J. pronouncing their vessel alone to blame for a collision with *Lighter No.* 5, in tow of the tug *Aristocrat*, both owned by the defendants, the Great Central Railway Company.

The case is reported on the question of the mandatory nature of the sound signals required by art. 28 of the Regulations for Preventing Collisions at Sea. (1)

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(1) Regulations for Preventing Collisions at Sea, 1897, as applied to the river Humber by rule 1 of the Rules for the Navigation of the Humber, made by Order in Council dated February 8, 1890:—

Art. 28: "The words 'short blast' used in this article shall mean a blast of about one second's duration.

"When vessels are in sight of one

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The facts fully appear from the following judgment, delivered on May 16, 1907, in the Court below:—

BUCKNILL J. This is a case of a collision between the Dutch steamship *Rijnstroom*, belonging to the plaintiffs, and the barge or *Lighter No. 5*, which took place about a quarter to six o'clock on the evening of November 28, 1906, in the river Humber. The *Rijnstroom's* tonnage was about 855 tons gross. She had a general cargo and two passengers, and was bound from Rotterdam to Hull, and she was going to the Humber Dock. The tide was ebb of the force of about a knot, and the wind was from the westerly quarter, a fresh breeze.

The *Rijnstroom* coming up the river went slightly higher than the Albert Dock entrance, and turned round under a port helm, and was then for practical purposes stationary in the river waiting until certain signals had been given to her from the dockhead that she was at liberty to go in. Vessels were then coming out. The tug and the lighter about a quarter of an hour, apparently, before the collision happened, or thereabouts, had started from a place called New Holland, on the south side of the Humber, and were bound to Lime Kiln Creek, Albert Dock basin. The tug *Aristocrat* was the property of the defendant company, the Great Central Railway Company, as was the *Lighter No. 5*, which the *Aristocrat* had in tow. The tug and tow, to get from New Holland to Lime Kiln Creek, Albert Dock basin, would cross the river at an angle. The tide was ebb, as I have said, and it would be, therefore, necessary for the tug to cross the river under a slightly starboard helm. There was a scope of tow rope of about fifteen fathoms between the stern of the tug and the bow of the lighter.

The important point in this case is whether the collision was brought about solely, or in part, by the *Rijnstroom* having gone

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another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean, 'I am directing my course to port.'

"Three short blasts to mean, 'My engines are going full speed astern.'"

astern. The evidence on behalf of the plaintiffs consisted of the master and the other persons who were on board the ship, and they all swore very positively that the vessel did not go astern, and, in one of the plaintiffs' documents referred to, it was said that she had been stationary in the river for twenty minutes without moving her engines. In the statement of claim the time was brought down to twelve minutes, but I had the opportunity of seeing the witnesses and observing as to their credibility, and I am satisfied, and I find as a fact, that this steamer did come astern; indeed, she must have come astern. Had she been there twenty minutes, or anything like it, it is certain that she would have drifted down from a short distance above the dock, and as she came down she would have been in a place of danger to those coming out from the dock had she not come astern. She had to keep up above the Albert Dock in a place of safety, and I find as a fact that her engines were moved astern, and that she did go astern at the time of this accident, or shortly before it.

As I find as a fact that she did go astern, I cannot accept the statement of the master or agree with those who invite me to come to a contrary conclusion.

But there is something else which indicates that the case of the plaintiffs is not one upon which I can rely. There was absolutely no look-out aft at all. A man named Crown, who gave evidence on commission, went over from the plaintiffs' side to the defendants' side, which is always unsatisfactory, and I was invited by one learned counsel, and almost invited by the other, not to rely much upon his evidence. One cannot judge from the man's demeanour in reading his evidence, but as far as I can come to a conclusion I should think his evidence is valueless, and so I treat it. There was no look-out aft on board the steamer. If this man or any other man had seen the lights of the tug, or one of the lights of the tug, coming down the river, it is clear he would have reported it, and the master of the plaintiffs' steamer said that the first he knew of this accident was the crash. The master had his own business to look after. He was a pilot as well as a master; he had a Humber pilotage certificate, and it was his duty to look out forward to see that the vessel was properly manœuvred, and kept out of harm's way in

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regard to vessels coming out of the Humber Dock. He cannot be blamed for not looking aft. He told us fairly enough that the first he knew of this collision was the crash when the tug or barge, he did not know which, came into the stern of the steamer. There was no look-out aft on board the steamer, and that was careless, because there should have been a look-out aft as well as forward in the circumstances. There was none. I also find as a fact that those on board the tug blew a long blast—a blast which the tug was entitled to blow, not necessarily because there was any risk of collision at that time, but because those on board the tug desired those on board the steamer to know where they were, and, as this blast signal was not heard by the people on board the steamer, I cannot help coming to the conclusion upon this point that they were extremely negligent. The master is not to blame personally, because he was doing what he had to do in looking after the navigation of the ship ahead and manœuvring her and keeping her in a proper position, so no blame attaches to him; but with regard to the other people on board the ship, upon whom he was entitled to rely, they were extremely careless and negligent, and the master did not receive that assistance he ought to have received to give him notice of the existence of this tug, and he was not told that a one blast signal was blown. He knew absolutely nothing of the existence of the tug and tow until the *Lighter No.* 5 hit him on the stern. So it is quite clear that those on board the steamer were guilty of negligence at a material time, which contributed at all events to, if it did not entirely cause, the collision. I will state what I have to say about that in a moment.

Now let me go to the defendants' case. They started from the place from whence they were coming, and the tug was towing the barge, which was a rudder barge—that is a point of some importance—not a mere dumb barge, which would swing more or less helplessly after the tug, but a lighter which was capable of being guided by a rudder. There was a scope of rope, as I have said, of about fifteen fathoms between the tug and the tow. They started to get to the other side of the river, and the evidence of the master of the tug was that when about 200 yards away, more or less, he observed that the steamer which he had seen coming up the river before she turned round was coming astern. As I have said, there is evidence before the Court to shew that the barge and the tug were under a slightly starboard helm, and that the man at the tiller of the lighter, seeing the steamer was not distant more than about 200 yards and coming astern, starboarded more, and they proceeded under that starboard helm, and the steamer still continued to move astern. It is ridiculous to say the steamer was moving back at any rate of speed—of course she was not; she was doing so at a pace taking into consideration the traffic coming out of the dock and the position she wanted to keep for going in. The barge proceeded under this further starboard helm, and the steamer kept going astern until it was clear that there was danger of collision, and then those on the tug, in order, as it is said, to make the thing either a very close shave or try to avoid it, hard-a-starboarded the helm, and her head got round to W.N.W., or six points or thereabouts, and the barge followed in a line; but it was too late, as the steamer was still coming astern. Nobody seems to have been aware of any porting excepting the man who gave his evidence on commission, who said he saw a porting, but I doubt whether he saw it at all. The collision then took place, the barge heading at that time about N.N.W., and her starboard bow struck the steamer on the rudder post, and is said to have done considerable damage.

Those are the facts as I find them, and I have asked the Elder Brethren certain questions. The first question I put to the Elder Brethren was this: Was the tug right in starboarding at 200 yards when the steamer was seen to be moving astern? The answer is Yes. I am going to give a reason for it. If she, the tug, had ported she would have been doing that which would have been, in the circumstances, an unseamanlike thing, and the reason given by the men on board the tug as a good reason is that she would have found herself sweeping down with the ebb-tide across the dock entrance and running a risk of getting herself run into by other traffic. That would not have been a seamanlike manœuvre, and the Elder Brethren's opinion is that the proper thing to do at that time, and at that distance, was to starboard the helm. The second question I asked them was this;

Did the tug do a proper thing by hard-a-starboarding when she did and keeping full speed ahead? The evidence is when she hard-a-starboarded the collision was—although the words were not used—imminent; that there was perilous risk of collision. The answer I have from the Elder Brethren is Yes. I will give a reason for that. If the barge had been a dumb barge without a rudder it is possible that the hard-a-starboarding of the tug would have saved the tug from collision, but would not have saved the barge, as she would have drifted down in a loop; but, as I said before, with the short scope of fifteen fathoms between the tug and the barge she, having a tiller, was able to follow the tug in a line when she hard-a-starboarded, and the Elder Brethren think that it was in the circumstances the proper thing to do, that is, for the tug to hard-a-starboard and to keep going full speed ahead.

Now it is to be noted that in the defence, paragraph 3, it is alleged that the tug stopped and reversed her engines to ease the blow. That is contrary to the evidence; the tug did not stop, and did not reverse. I have asked the Elder Brethren this question to make the ground quite clear—a third question. If the tug had stopped and reversed, as pleaded, would it have made any difference or have avoided the collision? And the answer is No; and the best thing to do in the circumstances was to hard-a-starboard and to keep going full speed ahead.

Now we come to a matter which is not pleaded, and which is, perhaps, most difficult of all to deal with. It is pleaded that the tug gave one long blast: "As the tug and the *Lighter No.* 5 approached the north side of the river the *Rijnstroom* was seen to be coming astern, whereupon the tug sounded one long blast, but as she received no reply and the *Rijnstroom* had sternway on her, those on the tug hard-a-starboarded their helm to throw the *Lighter No.* 5 away from the *Rijnstroom*, and stopped and reversed." I think there can be no doubt that there was a breach of the rules of navigation in not giving the starboard helm signal when she hard-a-starboarded, and I should be inclined to think when she starboarded also; but, as has been pointed out to me, there is evidence to shew that almost from the place where the tug and the lighter commenced their trip, the tide being ebb, and the wind being from the westerly quarter, they must have come on, as one of the witnesses said, under a starboard helm. They had to keep their position by slightly starboarding their helm, but there was a time when they starboarded again, that is to say, when the steamer was 200 yards off, that was when she was much nearer. One long blast was sounded, but no two blast signal, as directed by the rules, to tell the steamer that the tug and barge were directing their courses to port was given. It is to be noted that the statement of claim did not allege any breach of art. 28, which is the helm signal article. A breach of arts. 27 and 29 has been alleged, but not of art. 28, but I have consented to such an alteration of the statement of claim as will allege a breach of art. 28. Now there having been a breach of this rule, the Act of Parliament comes in. The Merchant Shipping Act, 1894, s. 419, sub-s. 4, states: "Where in a case of collision it is proved to the court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary."

Now the position was this, on board the steamer—no look-out; the one blast not heard; the existence of tug and barge, which might have been made known, and was, so far as the tug and tow were concerned, made known to the steamer, was not made known to her master. Either the one blast, which in fact was given by the tug, was not heard or it was disregarded, and I have asked the Elder Brethren this question, and it is in the same language as was put by Sir Robert Phillimore in the case of *The Tirzah* (1): "Could such an infringement of the regulations by possibility have contributed to the collision?" and his Lordship said there: "That is evidently a question for the Elder Brethren who have assisted me with their nautical skill"; and I have asked the Elder Brethren who are assisting me this: "Could their not giving a starboard helm signal on board the tug by possibility have contributed to the collision?" We have gone very carefully into this part of the case in all its bearings,

(1) (1878) 4 P. D. 33, at p. 37.

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and finding as I do that there was this bad look-out on board the steamer, and that the master did not receive the information that he should have received from his crew, and that he was, therefore, entirely in ignorance as to the existence of the tug or the barge, although the tug had given this one long blast; when she starboarded, not when she hard-a-starboarded, not at the last moment, but that she gave it reasonably and properly to indicate her existence to the steamer, that, although there has been a technical breach of art. 28, that such a breach could not by possibility have contributed to the collision. That is the view of the Elder Brethren, and I agree with it. The result of all this is that the steamer has not made out her case, and that this collision was caused by negligence on her part, and although there was the breach of the statutory regulation on the part of the tug and barge, whose witnesses I wish to say I find to be credible persons, and whose testimony I accept, I come to the conclusion that, although there was this breach, it could not by any possibility have contributed to the collision, and my judgment must therefore be for the defendants.

On appeal :—

1907. Oct. 21, 22. *Aspinall, K.C.*, and *H. C. S. Dumas*, for appellants (plaintiffs), owners of the *Rijnstroom*. It is submitted that the judgment in the Court below pronouncing their vessel, the *Rijnstroom*, alone to blame should be varied by finding the *Aristocrat* also to blame on the ground that those in charge of that tug failed to give the appropriate sound signal required by art. 28 of the Regulations for Preventing Collisions at Sea as applied to the Humber by Order in Council.

According to the preliminary act of the defendants (art. xii.), "the tug starboarded her helm to clear the stern of the *Rijnstroom*." This statement is repeated by paragraph 3 of the defence, and, therefore, the tug should, at that time, have given a two short blast signal, as she was taking steps with regard to the other vessel at a period when there was risk if nothing was done: see per Kennedy L.J. in *The Bellanoch*. (1)

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(1) [1907] P. 170, at p. 192.

The article applies to a vessel taking a course "authorized or required" by the rules for the purpose of avoiding collision, and in *The Uskmoor* (1), recently approved by this Court in *The Anselm* (2), it was laid down that the word "authorized" in the rule included any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight. Such a course the *Aristocrat* was admittedly taking, and, therefore, the case is clearly within art. 28, with all the penal consequences attaching to a breach of the rule by reason of s. 419, sub-s. 4, of the Merchant Shipping Act, 1894.

The learned judge in the Court below has, however, held that, though there was a technical breach of the regulations as to whistling, the breach could not by possibility have contributed to the collision; but it is submitted that it does not follow that because those in charge of the *Rijnstroom* did not hear, or did not pay attention to, the long blast given by the *Aristocrat* that, therefore, they would not have heard, or paid attention to, a two short blast signal conveying the information that the *Aristocrat* was starboarding for them. [The case of the *Duke of Buccleuch* (3) was referred to.]

J. A. Hamilton, K.C., and *Simon*, for respondents (defendants), owners of the *Aristocrat* and *Lighter No.* 5. The learned judge in the Court below has, on the advice of the Elder Brethren, found that in the difficult position in which the tug was placed "the best thing to do was to hard-a-starboard and keep going full speed ahead," and it is obvious that, if the tug had stopped and reversed, she and her tow would have drifted down the river with wind and tide. In these circumstances the Court has held that when the tug sounded the one long blast "she gave it reasonably and properly to indicate her existence to the steamer," and, with reference to the omission to give the two short blasts, the learned judge, following the case of *The Tirzah* (4), put the question to the Elder Brethren, "Could their not giving a starboard helm signal on board the tug by possibility have contributed to the collision?" and received an answer in the negative. In the opinion of the Court, the infringement of the regulations was, therefore, not a material cause of the collision: see *The Magnet* (1), and even if the infringement could by possibility have contributed to the collision, the infringement does not entail the penal consequences referred to in s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, as sound signals are not included in the regulations to be made by Order in Council under s. 418 of the same statute.

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(1) [1902] P. 250.
(2) [1907] P. 151.
(3) [1891] A. C. 310.
(4) 4 P. D. 33, at p. 37.

The evidence is that the master of the *Rijnstroom* was engaged forward attending to the duty of getting into dock, and that he was relying upon a look-out man aft; but there was no look-out aft, as the man who should have been looking out was not there. No amount of whistling would, therefore, have had any effect.

It is further to be observed that the tug was not taking a course within the meaning of art. 28; but being already under a starboard helm on account of the ebb tide, she, after giving a long warning blast, only emphasized that helm by hard-a-starboarding in order to get round the stern of the *Rijnstroom* on seeing that vessel coming astern.

This Court will be slow to disturb the finding that the tug was not to blame, based on the opinion of the nautical assessors, for it would be difficult to say that the Court below either misdirected itself in point of law or misconceived the facts.

LORD ALVERSTONE C.J. This is an appeal in a collision case which occurred in the night-time in the River Humber, just off the Albert Dock, between a foreign steamer, the *Rijnstroom*, and the tow of a tug belonging to the Great Central Railway Company. The finding of the learned judge that the *Rijnstroom* was to blame has not been disputed in this Court. He has found that the *Rijnstroom* was clearly guilty of negligence at a material time which contributed to the collision. It has not been argued that that finding was wrong; therefore we have no need to consider the manœuvres of the *Rijnstroom* except in so far as they have any bearing on the navigation and conduct of those on board the tug.

I proceed to describe the conduct of the tug in general terms. She left the south side of the Humber, the New Holland Pier, and was making for a point on the north shore nearer the sea. To get across she had to use her starboard helm. She observed, at a considerable distance off, the *Rijnstroom* coming up the river; then she saw the steamer turn round, and getting, roughly speaking, about north-east, head towards the Humber Dock entrance. Under those circumstances, if the vessels had continued, the *Rijnstroom* practically in the same position and the *Aristocrat* going across the river under her starboard helm, there would have been no collision. The *Aristocrat* would have continued to starboard as much as was necessary, and would have gone clear to the westward of the *Rijnstroom*. At a distance which was roughly stated at 400 yards or thereabouts—though finally the evidence rather points to a distance of 200 yards—the *Aristrocrat* saw that the *Rijnstroom* was coming astern. It has been contended before us that the *Aristocrat* never really starboarded for the purposes of the *Rijnstroom* or to avoid the *Rijnstroom*—that she only starboarded sufficiently to keep her head on what is called her course to get to the Albert Dock. If that were the true view of the case very different considerations would arise, but I think we must ascertain, in order to see whether there has been a breach of duty under the rule, what was the real manœuvre which the *Aristocrat* took.

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(1) (1875) L. R. 4 A. & E. 417.

Now in Admiralty appeals we regard with very great importance the preliminary acts and pleadings. In the preliminary act of the respondents, having said that the *Rijnstroom* had turned round, it is stated that the tug starboarded her helm to clear the stern of the *Rijnstroom*, and the lighter immediately did the same. That is obviously a manœuvre for the *Rijnstroom*, and it goes on to say "both would have cleared the *Rijnstroom*, but the *Rijnstroom* put her engines astern and gathered sternway, and, in spite of tug and tow putting their helms hard-a-starboard, the *Rijnstroom*, coming astern, struck the lighter." That is a statement of a manœuvre of starboarding for the *Rijnstroom*. In their pleadings it is put that the *Rijnstroom* was about 400 yards away on the starboard bow. Then, without reading all the passages in the evidence which has been accepted by the learned judge, I will refer to some of the leading points.

In the cross-examination of the master of the tug the following occurs: "You starboarded your helm?—Yes." "Intending to pass under her stern?—Yes." "When you starboarded your helm you told me you had him on your port bow. When you starboarded your helm to pass under his stern, did you blow two short blasts?—No." Then the mate said, "When we saw that she had turned round, we starboarded to come under her stern."

I am satisfied that the learned judge came to the right conclusion when he held in his judgment that there was a starboarding for the purpose of going under the stern of the *Rijnstroom*. Under these circumstances we have to consider whether we ought to hold the *Aristocrat* to blame for a breach of art. 28. A number of points have been made, but not seriously pressed, by learned counsel. In the first place, it was to a certain extent suggested that there was not an alteration of course here. We pointed out, in the judgment in *The Anselm* (1), that in this very art. 28, course did not mean compass course, but was an alteration of the direction of the vessel herself, taken with reference to another ship. Then it was suggested by the respondents' counsel, that a breach of art. 28 did not involve the consequences contemplated by s. 419, as it now is, of the Merchant Shipping Act. I am clearly of opinion that this art. 28 is one of the regulations made under the Order in Council the breach of which will involve the consequences under s. 419. Both on the face of art. 28 and in its connection with the other regulations it is one of those articles which come in every sense within the statute contemplated as being regulations that are from time to time made under the Order in Council for the purpose of preventing collisions.

I now come to the really difficult question of this case. The learned judge thought there had been a breach of art. 28, in which we all agree with him. I certainly think that, the tug electing to pass under the stern of a vessel even while she was not stationary in the water—not at anchor, but keeping herself against the tide approximately in the same position—the necessity arose for indicating that the *Aristocrat* was directing her course to port. I think that signal ought to have been given when the *Aristocrat* continued her starboard helm to go under the stern of the *Rijnstroom*. It was faintly suggested that art. 28 means taking a course, that is, changing a course, instead of keeping a course which will have the effect of directing the course of the vessel either to starboard or to port. The contrary of that was really decided by Lord St. Helier in *The Uskmoor* (1), and certainly is involved in the judgment of the Court of Appeal in *The Anselm*. (2) I desire to say, in my judgment, the continuing of a helm is just as much a directing of the vessel's head or the vessel's course to one side or the other as changing her course, and on that point I think it right to say I have no doubt.

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(1) [1907] P. 151, at p. 163.

The learned judge thought that the defendants, the owners of the *Aristocrat*, had satisfied him that by no possibility could the neglect to give the starboard helm signal have contributed to the collision. The ground on which he seems to have held that is that, inasmuch as the negligence of those on board the *Rijnstroom* was such that they never noticed the *Aristocrat*—he finds, in fact, that the master never knew of the presence of the tug or tow at all—and that nobody on board paid the smallest attention to the one blast which was given when they saw the steamer was coming astern, therefore the absence and neglect to give the two blasts could not by any possibility have contributed to the collision.

I think it would be very dangerous to allow this excuse for neglect to obey the rule, or to come to the conclusion that the giving of a proper signal would have no more influence, or attract no more attention, than the giving of a neutral signal. I wish to adopt what Kennedy L.J. has said in the course of this argument. The one long blast given by a tug in a river may be given for many reasons. It may be to warn a small boat to get out of the way; it may be given because somebody is wanting to come off the steamer. It is no indication of one ship manœuvring for the other, and I am not prepared to say, however negligent and careless the people were, it follows that because the one blast was not heard, or was not attended to, the two blasts might not have been attended to. I am rather fortified in that, because the learned judge, though I say it with great

(1) [1902] P. 250.

(2) [1907] P. 151.

respect to his judgment, seems not to have considered that it was not heard only, but that, if heard, it was disregarded. It seems to me to be one thing to disregard a signal which did not give any necessary indication with reference to this ship, and quite another thing to give at a distance of 200 or 300 yards, or even shorter as the case may be, a signal which must have had reference to this ship. I think, therefore, the fact that the master did not receive the information he should have received, and was left entirely in ignorance as to the existence of the tug or the barge, is not sufficient to prove that by no possibility could the neglect to give this signal have contributed to the collision. Those on board the tug could not possibly tell that there was no proper look-out on board the *Rijnstroom*. They see the *Rijnstroom* coming astern at such a period that it is necessary for them to continue their starboard helm, and possibly do more—to go hard-a-starboard. According to the evidence of one of the witnesses, the steamship had to come astern because of the presence of another ship coming out of the dock, and the learned judge seems to have thought that she might have reason to come astern. Therefore the necessity for her to do so was a possibility that ought to have been in the mind of a prudent seaman, and under these circumstances, it seems to me, so far as the *Aristocrat* is concerned, it can scarcely be contended that it was not her duty at once to indicate to the steamer coming astern, "I am altering my course under a starboard helm so as to come under your stern." I am differing from the learned judge, and I am doing so with great hesitation, because one knows his experience. If I thought it was sufficient to say that they would no more have heard or paid attention to the two blasts than to the one blast, then I should have felt bound by the decision at which he has arrived that it was one of those cases in which you could fairly say neglect of the rule had nothing at all to do with the collision. In the first place, I am not satisfied of that, and it seems to me he has not sufficiently considered the question that this vessel, the *Rijnstroom*, was entitled to have the warning given by the vessel manœuvring for her, "I am starboarding to come under your stern." I think, therefore, there was a breach of the rule, and that the learned judge has not sufficiently considered what the duty of the *Aristocrat* was when he has come to the conclusion that by no possibility could it contribute to the collision. With great deference, I think the mere fact that possibly they disregarded the one signal is not sufficient to lead one to the conclusion that they must have disregarded the other. Therefore the *Aristocrat* must be held to blame for having broken art. 28.

I think it right to add that our assessors are not satisfied that she was justified in maintaining her speed. They incline to think that, had she stopped her engines and slackened her speed and allowed the tow to swing round astern of her, there would have been less probability of collision. Speaking for myself, I should not have been prepared to differ from the Court below on that point. As far as I can judge, I should myself have concurred in that judgment, but, as our assessors have indicated that opinion, it is only right that I should mention their view. The ground, however, of my decision is that there was a breach of art. 28, and I do not think that the learned judge was justified in finding that by no possibility could that breach have contributed to the collision. Therefore this appeal must be allowed, and both vessels held to blame.

BUCKLEY L.J. I am of the same opinion. Art. 28 applies, no doubt, only as from the moment when, the vessels being in sight of one another, such circumstances have arisen as to make it necessary for one or the other to take steps to prevent the contingency of a collision possibly ensuing. I am willing to assume that when the tug at 400 yards' distance from the *Rijnstroom* starboarded her helm, that state of things had not arisen. The tug did not know that the *Rijnstroom* was coming astern. As I read the evidence, there was probably plenty of room for her to go by, but at a subsequent moment, within 200 yards, she perceives the *Rijnstroom* is coming astern. At that moment her duty was to blow two short blasts, but she blew one long blast. From that moment onwards she owed the duty to the *Rijnstroom* of indicating to her not simply "I am here, take care of what you are doing," but "I am here, and I am going to take such a course that if you continue coming astern there will probably be a collision." She did not do that, and that was a breach of art. 28.

The other question is whether the learned judge was right in holding that under no circumstances could the breach have assisted or produced the collision. It seems to me it is not possible to say that this is so, for this reason: It is quite true the master of the *Rijnstroom* paid no heed to the one long blast. Whether he would have paid heed to the two short blasts, indicating—if he turned round and looked—that a vessel was coming across his course, I do not know. It seems to me that it is impossible to say he would not. As I understand the authorities, if the breach is one which could not have contributed to the accident—as, for instance, that a light was not burning at a point which the other vessel could not possibly have seen—that may be an excuse. That is not this class of case. I do not know what might have happened if, instead of blowing the long blast, the tug had given the proper signal. The collision might have been averted if she had taken that course. Therefore I agree with the judgment that has been given by the Lord Chief Justice.

KENNEDY L.J. I have come to the same conclusion, and as we are differing from my brother Bucknill in the Court below, who gave a decision with the concurrence of his assessors, I will state my reasons for that conclusion.

There is no doubt at all that the *Rijnstroom* did, in fact, commit an actionable wrong. The question is whether or not those on the other side in the action were also really in a position in which they ought not, on the facts, to escape being also held to blame. The matter turns upon art. 28. It turns upon the omission to give a certain signal prescribed in the terms of that article, which I need not recapitulate. I hold that it is an article which carries with it, if there be a breach, the penalty of being presumed to have committed an actionable wrong on the part of those who do not observe it. It is contended for the respondents, that there was no occasion for that rule to operate, because, putting aside the final act of the hard-a-starboard helm on the part of the tug, there really never was a time at which the tug came by action of the helm within the operation of the rule so that those on board were bound to give the signal. As to that, I differ on the question of fact. I agree with the learned judge below, who has found that there was such a time. It is essential for the case of the appellants that there was a time when the signal, "I am directing my course to port," ought to have been blown. As the Lord Chief Justice has said, it seems a curious case to set up here that there was not such an action of the helm when you find in the respondents' preliminary act under the head 12: "what measures were taken and when to avoid a collision," a statement distinctly put that the tug starboarded her helm to clear the stern of the *Rijnstroom.* When was that? I do not care whether the distance was 200 or 300 yards. It seems to me for this purpose to be immaterial. There was at a distance, whether it be 200 or 300 yards, a starboarding for the purpose of clearing the stern of the *Rijnstroom.* It cannot be treated as an act merely to keep her course under a starboard helm across the river, for it is an act pleaded solemnly in the preliminary act as having been done for the purpose of avoiding the other ship. Therefore the conditions had been fulfilled which brought the rule into operation—first, that vessels must be in such a relation that, as a matter of seamanship, one ought to act for the other; and, secondly, that action was in fact taken by directing the course in a particular direction. That this was also quite clear to the mind of the learned judge appears from the judgment. In more than one passage he speaks of the starboarding to avoid the collision, and then the subsequent hard-a-starboarding, and he treats that as being borne out by the evidence which is pleaded by the parties themselves in the preliminary act. Fairly read together, I think the evidence of the master of the tug points entirely to the same thing, because while there is no doubt that at some time from the moment of starting he would put his tug's helm to starboard, and to some extent keep it so, in order to meet the effect of an ebb tide, there is alleged, as I understand the evidence, a starboarding in order to get under the stern of this vessel —in other words, to avoid a collision. Then did she signal?

She did not signal in the way prescribed by the article. What she did do was to give a long blast. It is a matter of common knowledge to anybody who has had anything to do with any river in which there are vessels moving about under steam, particularly tugs, that there are all sorts of reasons for their blowing a single blast of the whistle, and if there ever was a time at which the rule in question ought to come into application it seems to me it is a time when it is dark, or at any rate dusk (the hour is given as 5.45), when vessels are coming in and going out of dock, and when a steamer which you are approaching has to perform the somewhat critical manœuvre of waiting on an ebb tide which, unless met by action of her engines astern, will drift her past the entrance she is aiming at. Evidence was given that there was a vessel actually coming out of dock at the time, which would necessitate reversing on the part of the *Rijnstroom*. But, be that as it may, whether right or wrong, here you have a time so dark that lights are required, and a tug coming across the river with a low object, a lighter with a rudder, in tow—a thing which one knows will swing round, and even with a rudder can only follow subject to certain conditions of swinging—not quite closely and immediately—the action of the tug in front. Great care is required to prevent its swinging—if the tug alters her helm—and so coming into collision with other objects in its vicinity. They saw the *Rijnstroom* coming astern, and they starboarded for her. That is what the learned judge has found, and what is the case in their own preliminary act. They gave no signal, as required by the rule. They gave another signal, a single long blast, which, as my Lord has said, really indicated nothing definite. Then, it is said, because that signal was given and—following the phrase used—no attention was paid to it on the part of the steamer, we ought to infer that no attention could by any possibility have been paid to the proper signal. To my mind I confess from the beginning that has seemed an extraordinary proposition. How stringently the Courts have always enforced proof that by no possibility could the infraction of the rule have contributed to the collision is made clear by decisions. I should like to refer to one in a case in which the vessel was not held to be at fault.

It is the judgment of A. L. Smith L.J. in the case of *The Argo* (1), delivered in the Court of Appeal in 1900, in which he lays down the law as following the House of Lords in the case of *The Duke of Buccleuch* (2): "It may be that, although there has been a breach of the rule, that breach of the rule does not necessarily condemn the ship which has committed that breach of the rule; 'that the infringement must be one having some possible connection with the collision, or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision, and the burden of shewing this lies on the party guilty of the infringement; proof that the infringement did not, in fact, contribute to the collision being excluded." With great respect to my brother Bucknill, who is so careful and well-versed in all these cases, I think that what in fact he has really decided is: Did this fact contribute to the collision? "Could not by any possibility" is the perfectly correct phrase he used; but how can anybody possibly say that the absence of a proper signal of two short blasts could not possibly have contributed to the collision when there are people on the steamer with ears to hear the sound? How can it be said that, because they paid no attention to the single long blast which was no helm signal, they would not have attended to the call of a vessel saying, "I am starboarding for you; I am altering and directing my course to port for you"—because that would have been the meaning of the two short blasts signal? I confess I have had great difficulty in understanding such a conclusion. It seems to me to open the door to the danger of really and practically saying, "I do not believe this vessel was, in fact, struck by the other vessel owing to the omission of the other vessel to give a statutory signal." That is not the law, and one must be very careful that not only in words, but in actual working out of the case, one is not substituting such an argument for the only one which the law allows, which is that by no possibility could the omission to obey the rule have contributed to the collision. As far as I recollect, the omission to do acts has been excused in cases which are not at all cases of this sort—cases of lights where there was no look-out on the other ship, or for any other reason the right light, if duly exhibited, could not have been seen. There may have been other cases, but I do not remember a case in which there has been an excuse of this kind which has been treated as a sufficient excuse for the omission of the proper sound signal.

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(1) (1900) 9 Asp. M. L. C. 74.

(2) [1891] A. C. 310.

In this case I think it is particularly important, if one may say so, to maintain the regulations. If there ever was a case in which a vessel ought to be held entitled to the fullest consideration in the matter of getting warning from another crossing the river, it is the case of a vessel which, like the *Rijnstroom*, was obviously, from no fault of her own, in the course of proper navigation, trying to keep herself, by using her engines astern, in a position for getting into the dock, and at the same time avoiding collision with the vessel coming out. Therefore those in charge of the tug ought to have said, "I must give her every chance." They ought to have assisted her by giving the best warning they could of exactly what they were doing, and we ought not too lightly to accept as a valid excuse for not giving the prescribed warning, the defence: "They did not do anything. They did not attend to the single long blast, and therefore we are justified in arguing before the Court that they would not have paid any attention if we had given the signal which the article prescribes." I rest my decision on that ground. But there are two other matters which, speaking entirely for myself, I wish to call attention to. Here was a tug going not more than six knots, with a tow behind her at fifteen or twenty fathoms, herself, according to our view of the facts, able to escape a collision by hard-a-starboarding nearly at the last moment. I think she ought to have given the chance to the steamer, even at that moment, of ceasing to come astern with her engines by giving her the proper signal. As to the other point, as to whether she ought not to have been held to blame for keeping her speed and attempting in the first instance to pass behind this steamer when she saw she was coming astern, I do not wish to rest my decision on that. But my Lord has said what the view of our assessors would have been on that point, and I confess I should have been inclined to take the same view.

Appeal allowed with costs. No costs in the Court below.

Solicitors for appellants (plaintiffs), owners of the *Rijnstroom*: *Cattarns & Co.*

Solicitor for respondents (defendants), owners of the *Aristocrat* and *Lighter No. 5*: *D. H. Davies.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1907
Oct. 22, 23.

THE GUILDHALL.

Admiralty—Collision—Thames By-laws, 1898, *art.* 46*—Risk of Collision*

When two steam vessels, proceeding in opposite directions, the one up and the other down the river Thames, are approaching each other so that if they maintain their respective parallel courses they will pass starboard to starboard, but so close that any little deviation due to the effect of tide, or passing craft, or other impediment in the narrow waterway, may give rise to a position of danger, there will be "risk of collision" within the meaning of art. 46 of the Thames By-laws, and both vessels must manœuvre so as to pass port side to port side.

APPEAL by plaintiffs, the General Steam Navigation Company, Limited, owners of the *Leeuwarden*, against a decision of Bucknill J. pronouncing their vessel alone to blame for a collision with the *Guildhall*, owned by the defendants.

The case turned on the construction to be placed on the words "risk of collision" in art. 46 of the Thames By-laws, 1898. (1)

The facts, as found by the learned judge in the Court below, fully appear from the following judgment, delivered May 13, 1907.

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(1) Art. 46: "When two steam vessels or two steam launches, proceeding in opposite directions the one up and the other down the river, are approaching each other so as to involve risk of collision they shall pass port side to port side."

C. A.
1907

THE GUILDHALL.

Bucknill J. This is a case of a collision between the steamship *Leeuwarden*, the property of the General Steam Navigation Company, and the defendants' steamship the *Guildhall*, which took place off, or about off, Cuckold's Point, in the river Thames, about noon on December 16, 1906.

The *Leeuwarden* is a steamship of 990 tons gross, and she was bound from London to Harlingen. The *Guildhall* is a screw steamship of 2600 tons gross, and she was bound up the river, in charge of a duly licensed Trinity House pilot, from Bussorah to London, and she had two passengers on board.

The case for the plaintiffs is shortly this: That they were proceeding down to the south of mid-channel withal, and had manœuvred for barges which were to the southward of mid-channel, and having passed very close to one of them, were still proceeding down at a moderate speed; that the *Guildhall* was seen to the northward of mid-channel about 500 yards away, and nearly ahead; that the *Leeuwarden* then sounded one short blast, as a port helm signal, ported her helm, and put her engines slow ahead, they having been stopped shortly before; that the *Guildhall* then blew one short blast signal, but was seen to be acting under a starboard helm, whereupon the engines of the *Leeuwarden* were reversed full speed and three short blasts were sounded on her whistle, and shortly after that the collision happened. Her witnesses said that her first reversing signal was not answered by those on board the *Guildhall*, so another reversing signal was given, and then the *Guildhall* gave three blasts in reply.

The story told by the witnesses from the *Guildhall* is that they were bound up river and were coming up about mid-channel, or slightly to the southward of it withal; that the *Guildhall* had shortly before seeing the *Leeuwarden* acted for a down-coming steamer by giving her a starboard helm signal, and that those two steamers had passed starboard side to starboard side; that the *Guildhall* never got to the north of mid-channel; that she was passing up slowly with a tug in attendance, which tug was not at the time towing at her; that those on board the *Guildhall* were anxious about her, considering her draught, coupled with the fact that she was going to turn round shortly afterwards under a port helm, and she was therefore never at that time to the northward of mid-channel. Then it is said that the *Leeuwarden* was reported by the look-out. I may say at once that I find that a good look-out was kept on board the *Guildhall*, and that the *Leeuwarden* was reported to the pilot, and that the pilot saw her, the *Leeuwarden* bearing then about half a point on the *Guildhall's* starboard bow, and about a quarter of a mile distant; but, whatever the exact bearing was, the starboard side of the *Leeuwarden* was visible to those on board the *Guildhall*. The *Guildhall* then gave two short blasts, and the *Leeuwarden* replied with one, exactly the opposite of the story told by the *Leeuwarden*, which is that the *Leeuwarden* gave one short blast first. The *Guildhall* then says, having given those two short blasts, which the *Leeuwarden* answered with one, and indicating that she was proceeding under a port helm, that the engines of the *Guildhall* were immediately reversed and three blasts of the whistle were sounded; but the *Leeuwarden* coming on very fast struck the *Guildhall* with her stem, doing considerable damage.

Now, I have to find the facts, and the first fact I find is that the witnesses on board the *Guildhall* are telling the truth when they say she was in about mid-channel, or a little bit to the southward withal, coming up under a steady starboard helm, and that they had passed a down-coming steamer starboard side to starboard side, and had passed safely, and that the *Guildhall* was still acting under a slight starboard helm when the *Leeuwarden* was reported. I also find as a fact that the *Guildhall* was the one that gave the helm signal first; and I find as a fact that she did not blow a port helm signal at all, but blew two short blasts. She was then coming round the bend under a starboard helm, and she may have starboarded—I do not say that she had—for the other down-coming steamer, but she was, and had been for some time before the *Leeuwarden* was seen, coming round under a starboard and steady starboard helm. I find as a fact also that those on board the *Guildhall* saw the *Leeuwarden* slightly on her starboard bow, and shewing her starboard side, and it is to that fact, that those on board the *Guildhall* saw the starboard side of the *Leeuwarden*, that the Court attaches very much importance.

That being so, it follows that I cannot accept the story told by those on board the *Leeuwarden*. I cannot accept the story told by the *Leeuwarden* that she was to the southward of mid-channel, and that the *Guildhall* was on her port bow, nor can I accept the story about the helm signals, that the *Guildhall* blew one short blast and yet acted as if under a starboard helm.

I find also that the *Leeuwarden* was going faster at the time of the collision than it is alleged she was. I do not find that she was going down the river at too great a rate of speed, because she had a two and a half knot tide against her, and the speed at which she was going, supposing it was five knots, represents only two and a half knots over the ground. I cannot accept her story with regard to the helm signals, and I cannot accept her story of the place of collision with regard to mid-channel.

Now having found those facts, I have asked the Elder Brethren certain questions. I have asked them, "Assuming that the *Leeuwarden* was shewing her starboard side to the *Guildhall*, was the *Leeuwarden* justified in the circumstances in porting?" The answer is, "No, she was not." I have asked them this other question, "Supposing the *Leeuwarden* had done nothing except to proceed down under a steady helm on a steady down-river course, when she was shewing her starboard side to the up-coming ship, would there have been any collision at all, on the supposition, as I have found it, that the *Guildhall* was then acting under a steady starboard helm?" The answer is, "No; there would not have been a collision, and the down-coming steamer would have passed safely starboard side to starboard side to the *Guildhall*, as indeed the one which preceded her had in fact done."

That being so, it follows that this collision was not caused by anything that was done on board the up-coming steamer, but that it was caused by the *Leeuwarden* improperly porting her helm.

Now, in confirmation of that opinion, which is given to me by the Elder Brethren, I have this fact. I put this question myself to the master of the down-coming steamer; I said, "But do you mean to tell me, if the story of the *Guildhall* is correct that you were slightly on her starboard bow, that you would still have ported your helm?" He said, "Yes, I should." Then I said, "Although she was starboarding her helm and giving you a starboard helm signal?" And he answered, "Yes, I should." That shews that the master was acting under what I call a delusion, or an obstinate determination in certain cases to port the helm, and that if you port your helm you cannot be wrong; but you may very well be wrong, and I find, as a last fact, that at the time when the down-coming steamer ported her helm the two ships, being in the relative positions which I have found, were not proceeding so as to involve risk of collision, and, therefore, that the Thames rule as to porting did not apply. I think I have covered the whole ground; and my judgment is that the plaintiff ship the *Leeuwarden* is alone to blame.

On appeal: –

1907. Oct. 22, 23. *Aspinall, K.C.*, and *Bateson*, for the appellants (plaintiffs), owners of the *Leeuwarden*. These two vessels were meeting in about mid-channel at a bend of the river where the waterway is narrow. Care was, therefore, necessary, and art. 46 of the Thames By-laws specially provides for such a case by insisting that they shall port, for the meaning of that article is that if the two vessels, proceeding in opposite directions, the one up and the other down the river, are approaching each other in such a way that if they keep their respective courses they will pass so near that there will be danger of collision, they must manœuvre so as to pass port side to port side: see *The Odessa*. (1)

[Lord Alverstone C.J. There is no rule applicable to this part of the river as to which side vessels are to navigate?]

No. *The Ecossaise*. (2)

It is submitted, therefore, that the down-coming vessel, the *Leeuwarden*, rightly ported in obedience to the rule, whilst the up-coming vessel, the *Guildhall*, disobeyed the rule by maintaining her starboard helm, and that the learned judge in the Court below was wrong in holding that, in the circumstances, there was no risk of collision so that the rule was not applicable.

Laing, K.C., and *Dawson Miller*, for the respondents (defendants), owners of the *Guildhall*. The effect of the findings of fact by the learned judge in the Court below is to put the *Guildhall* a little to the south of mid-channel, and the *Leeuwarden* a little to the north of mid-channel shewing her starboard side on the starboard bow of the *Guildhall*, with the result that if both vessels kept their respective courses they would pass clear starboard to starboard without risk of collision. Under such circumstances art. 46 of the Thames By-Laws does not apply, for that rule is only applicable if the two vessels are approaching so as to involve risk of collision: see *The Velocity* (1) in respect of the narrow channel rule, that is, art. 25 of the regulations for preventing collisions at sea. There is no starboard hand rule applicable to this part of the Thames, and therefore, no obligation to port and get on the starboard side. *The Odessa* (2) has never been considered a satisfactory case in the Admiralty Court, for there the vessels on their respective courses would have passed one another at a comparatively safe distance: see *The Joseph Rickett.* (3) Even if the *Guildhall* is to blame, her owners must escape liability on the ground of pilotage, for the learned judge in the Court below has found that there was a good look-out.

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(1) (1882) 4 Asp. M. L. C. 493.

(2) *Shipping Gazette*, Dec. 15, 1885.

[*The Cleopatra* (4) and *The Bywell Castle* (5) were referred to.]

Bateson, in reply. Any little deviation in the steering would have produced danger, and, therefore, there was risk of collision within the meaning of the rule.

Lord Alverstone C.J. This case has given me a great deal of difficulty; but I think it is important that I should give judgment whilst I have a clear recollection of the arguments and the facts, especially as it seems to me that we have to deal with a broad principle.

I have been much impressed in favour of the respondents with the fact that the appellants took into Court a case which the judge has wholly disbelieved. They said a port helm signal was given from the *Guildhall*; they said her helm was all wrong, and that she would not steer, and they put themselves far away over to the south. Some of their witnesses stated that they were as much as halfway between mid-channel and the south shore. I can quite understand that the learned judge in deciding as he did against the *Leeuwarden* was very much influenced by the fact that the case which was made by the *Leeuwarden* had broken down hopelessly in many respects.

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(1) (1869) L. R. 3 P. C. 44.

(2) 4 Asp. M. L. C. 493.

(3) *Shipping Gazette*, March 5, 1901.

(4) (1856) Swa. 135.

(5) (1879) 4 P. D. 219.

We have to consider art. 46, and its application in a part of the river where its operation has not had to be directly considered before, and where there is only a narrow waterway. There are influences of tide one way or the other—in this case a flood tide—underneath a ship going up, and in some cases there may be craft which may or may not impede the navigation of the one vessel or the other. We have to say what are the duties of the two ships when they are navigating in such a part of the river as that, and what are their obligations, having regard to the directions of art. 46.

At one time it seemed to me, listening to the arguments of counsel for the respondents, that a short answer to this appeal might be given upon the ground that the learned judge had held that at a distance of, roughly, 400 yards or thereabouts, when these vessels sighted one another, at any rate from the point of view of manœuvring for one another, the *Leeuwarden* had so navigated herself, or was so navigated, having regard to what she had done before, that she brought herself shewing her starboard side upon the starboard bow of the *Guildhall;* and that that being so, to take the learned judge's language, "in the relative positions" in which they then were proceeding, they "were not proceeding so as to involve risk of collision." I do not overlook the fact that he had said the *Leeuwarden* was bearing about half a point on the *Guildhall's* starboard bow, and about a quarter of a mile distant. I confess I should have had a good deal of difficulty, examining the evidence, in finding that she had ever got so broad as that, but I assume for the moment that that was the learned judge's opinion. The *Guildhall* was "in about mid-channel or a little bit to the southward withal, coming up under a steady starboard helm," and "the *Guildhall* saw the *Leeuwarden* slightly on her starboard bow, and shewing her starboard side." Counsel for the respondents satisfied me that in putting the question which he did to the Elder Brethren it must be assumed that the learned judge had told them, or they would know, that the *Leeuwarden* was shewing her starboard side to the *Guildhall* a little on the starboard bow of the *Guildhall.* If that explanation is not given it is extremely difficult to reconcile the way in which the question was put to the Elder Brethren. If I had not been convinced that there were other considerations to be dealt with in this case, and that we had to look at the matter from a slightly different standpoint, it would have satisfied me to have affirmed this decision upon the ground that the learned judge had found that, at a distance of 400 yards, these two vessels were proceeding upon concentric circles, one under starboard and the other under port helm, that the circle in which the *Guildhall* was going was well inside the circle in which the *Leeuwarden* was going, and therefore there was no risk of collision. But, after careful consideration, it seems to me, both upon principle and authority, that would be too dangerous a view to adopt. I am not going to differ from Bucknill J. upon the ground that he did not put the fact that the *Leeuwarden* was upon the starboard side of the *Guildhall* in that question to the Elder Brethren. The learned counsel are agreed that, if the real question which he considered was whether the *Leeuwarden* was shewing her starboard side to the *Guildhall* independently of the position of the *Leeuwarden* on the starboard side of the *Guildhall,* he would certainly not have considered the proper question. Therefore I do not assume that he only regarded the fact that the *Leeuwarden* was shewing her starboard side to the *Guildhall.*

We are advised by our assessors, and so far as a landsman may, it seems to me I should concur with the view, at any rate if we apply the principles of certain decisions—we are advised that, even taking the *Guildhall* to have got the *Leeuwarden* slightly, or fine, or a quarter of a point, which I think is the outside at which it can be put, upon her starboard bow, they were still approaching round such a point as this so as to involve risk of collision. That is the advice given us by our assessors, and I certainly see no reason, so far as I am entitled to express any opinion, to differ from it. It does seem to me, if the rule means anything, that we have got to apply it in a case in which the total waterway is said to be but 600 feet. You have got the question of what may be the effect of tide setting vessels over the one way or the other, the effect of difficulties of navigation which may prevent there being the clear concentric circles to which reference has been made; and certainly it does not seem to be suggested in this case that there is any obstruction on the north side of the river to prevent the *Guildhall* having gone up to the starboard side of mid-channel, that is, acting under her port helm. We have to consider whether or not there is any principle of law that would justify us in coming to the conclusion that, if the *Leeuwarden* had got slightly upon the starboard bow of the *Guildhall*, we ought still to hold that there is no risk of collision in the face of the advice given to us by our assessors that the vessels were approaching so as to involve risk of collision, and that the duty of each one of them was to port. So far as there is any authority it certainly tells the other way. The case of *The Odessa* (1), which has been admitted by counsel for the respondents to be a difficulty in their way, is a case in the Court of Appeal. They have said that it is treated with something like contempt in the Admiralty Court whenever it is cited; but we have to look at the language of the learned judges in that case, in which the vessels were approaching green to green. If we had been advised that the fact that this was a daylight collision and the vessels could so clearly see their relative positions in the channel as to make *The Odessa* (1) not an authority which had to be considered from a legal and navigation point of view, different considerations might have arisen. But, accepting, as I am bound to do, the advice given by our assessors as to the duty of these ships from a navigation point of view, and having regard to the fact that, as seamen, they tell us that the two ships were approaching so as to involve risk of collision, it becomes important to see what was said in *The Odessa* (1) on this point. Brett L.J. said: "I take that judgment to be, that the position of the vessels, even as given by the witnesses for the *Murton*, was, in the opinion of the assessors below such, not that there must have been a collision if they

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(1) 4 Asp. M. L. C. 493.

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proceeded in the courses they were then upon, but that there would have been risk of collision in this sense—that if the vessels had kept on, they would have passed so closely to each other that any small obstruction in the river, or slight variation in their course, would have caused a collision. In other words, they were in such a position that, if they had continued their courses, there would have been reasonable risk of a collision." This collision occurred in Gravesend Reach, where the river is very much wider and there is much less chance of obstruction than in the Limehouse Reach. Brett L.J. proceeds: "Now, it is said that the vessels were going on nearly parallel courses, and that they were a quarter of a mile off when they saw each other's green light. That is true. But how did each vessel see the green light of the other? Those on board the *Murton* saw the green light of the *Odessa*, a point on their starboard bow. That might be, although the vessels were not on exactly parallel courses, but if one vessel was only slightly pointing to the other the two vessels might have crossed one another's course. It is only on the supposition that both vessels would keep on parallel courses that they would pass each other without collision. Mr. Butt says that so long as green light was to green light there would be no danger of a collision, and he says, if we hold to the contrary, that will be making a hard and fast rule. On the contrary, I think that, if we adopted his theory, we should be making a hard and fast rule. Whether there is risk of collision must be a question of fact and skill, to be decided by the learned judge, with the assistance of assessors, on the evidence brought forward." I cannot help pointing out that if that kind of reasoning was applied in such a case as *The Odessa* (1) it certainly, in my judgment, applies a fortiori when we are dealing with a case the facts of which are such as those which appeared from the judgment I have briefly summarized when I said I assumed for the moment that the learned judge thought the vessels were rounding this point, one under starboard helm, and the other port, the *Leeuwarden* getting a quarter of a point, or slightly or fine on the starboard bow of the *Guildhall.* Their passing on the concentric circles depends on the degree of

(1) 4 Asp. M. L. C. 493.

starboarding and porting of each ship; it depends upon there not being influence of tide or other influences which might tend to make the circles non-concentric. And it seems to me that there is good sense in holding that our assessors are right when they advise us that it was cutting it too fine. I notice also that Mr. Butt, the eminent counsel who was then appearing on the appeal, cited *The Cleopatra* (1) to the Court, and, therefore, if the distinction which has been attempted to be drawn by counsel for the respondents could be drawn in that case, no doubt it would have been pointed out by the Court. But certainly it would not apply to the case we are dealing with of the vessels approaching this crowded part of the Thames, with the difficulties, not to say dangers, of navigation to which I have referred.

I think, therefore, even taking the case as Bucknill J. found it, and assuming that there was involved in his direction to the assessors that the *Leeuwarden* was slightly upon the starboard bow of the *Guildhall*, we must act on the advice given us, even on this state of facts, that these vessels were approaching so as to involve risk of collision. I ought to add for myself that I should have had great difficulty in going as far as Bucknill J. did upon the facts. I quite understand that we are dealing with a question of fact, and I do not say I should have been disposed to reverse the learned judge if there had been only the question of fact. But, going through the evidence, I have come to the conclusion that both these vessels as they came up were very near mid-channel, one possibly a little to the south, the other possibly a little to the north; but the impression produced upon my mind on all the evidence which has been read to us is that these vessels were, practically speaking, approaching very nearly in mid-channel, and therefore the initial position when they each began to round the point was of vessels approaching so as to involve risk of collision. I should have had a difficulty in thinking that the *Leeuwarden* was ever so much on the starboard bow of the *Guildhall* as would have determined that risk of collision when it existed.

The consequence is that, in my opinion, the appeal ought

(1) Swa 135.

to be allowed on the ground that the duty of these two vessels as they approached one another was to obey art. 46. I may point out on broad principles that when there is risk of collision the rule is peremptory and must be obeyed. We ought certainly not, if it is open to us, to cut that rule away by allowing people to judge too finely and too nicely as to whether they can get by with a shave, or whether if each of the vessels acts exactly with the same degree of helm, one starboard and the other port, they will happen to pass one another safely. The appeal must therefore be allowed in so far as regards the finding that the *Leeuwarden* was to blame for porting, and that the *Guildhall* was not to blame for not having obeyed the rule. It is contended by counsel for the appellants that we ought to prevent the defence of compulsory pilotage being available for the *Guildhall*. It was ingeniously put by them that the pilot saw the vessel in the wrong place, or that he thought he saw the vessel in another place than that in which she was; that the look-out had informed the pilot that the *Leeuwarden* was not where he (the pilot) thought she was. There are a great many assumptions in that argument. I will not enumerate them. But we know the practical way in which these vessels are reported. It is a daylight collision. It is not suggested that the pilot did not see the vessel in ample time to act for her, and I entirely agree with Bucknill J. when he expressed the opinion that there was no reason for suggesting that the *Guildhall* was to blame for not keeping a proper look-out. Therefore the defence of compulsory pilotage will prevail, but the appeal must be allowed in so far as the judgment proceeded on the basis that art. 46 did not apply. I think the *Guildhall* was to blame for not obeying that rule, and the *Leeuwarden* acted properly in porting to pass on the port side of the *Guildhall*.

Buckley L.J. I agree. The determination of this appeal so nearly depends upon a mere question of fact that it is not without hesitation that I have arrived at the conclusion that we must differ from Bucknill J. I am strongly of opinion that if a pure question of fact has to be determined, the judge who has seen the witnesses and heard the evidence given is in a much better position to determine the question of fact than this Court, acting upon the written evidence. But the appeal does not turn wholly upon a question of fact.

In the first place, so far as the question arises on the construction of art. 46, that of course is law and not fact; and if risk of collision means, as I think it does, not that an accident presumably will happen, but that the circumstances are such as that precautions ought to be taken to avoid the possibility of danger, then I doubt whether the learned judge has properly applied the rule to the facts with that meaning in mind. Another point is this: that if risk of collision means what I think it means, it involves really what is a question of opinion rather than a question of fact. It is not a mere question of fact whether such circumstances have arisen as that precautions ought to be taken. It is a question of nautical opinion, the opinion of persons skilled in these matters, as to whether the facts are such that in their judgment that state of circumstances has arisen. Now here our assessors without any hesitation say that in their judgment as persons skilled in this matter, the position was such that there was risk of collision. They think certainly the *Guildhall* ought to have ported. We must bear that in mind. The fact that the *Guildhall* found the starboard side of the *Leeuwarden* open to her at a slight angle on the *Guildhall's* starboard bow is the main fact on which the learned judge has proceeded. As to the exact bearing which that fact has on the question of risk or no risk, it seems to me nautical opinion must be relied upon.

Under these circumstances, paying all respect to the learned judge, who was a much better judge than I am of the facts, I agree in thinking his judgment is erroneous, seeing that in the opinion of those who advise us in this matter the circumstances were such that there was risk of collision.

KENNEDY L.J. I am of the same opinion. I personally have the greatest reluctance in differing from the learned judge below in his conclusions upon facts. Even if my own view were to some extent the other way, I should feel myself bound to accept, where it is possible to do so, the version accepted below, knowing, as I do, how frequently what appears on paper gives an inadequate and sometimes an inaccurate expression of the evidence when given orally.

In this case, however, if I correctly follow the judgment and the arguments by which we have been so greatly assisted, there is really no finding of fact as to which it appears to me we are reversing the finding below in dealing with the one point on which with great respect I differ from my brother Bucknill. He has not found in his judgment, that I can see, the position of the *Leeuwarden* at the time when she and the *Guildhall* sighted each other. He has found simply that he does not believe the statement that she was to the southward of mid-channel, but leaves her position otherwise, as far as I can see, undefined. Speaking with the diffidence which a layman ought to feel in such matters, I cannot help thinking that the finding of that position is one of the most material facts as to the correctness or incorrectness of the plaintiffs' allegations as to the breach of the rule in question.

Now it seems to me that the apparent difference of opinion, between the learned assessors who assisted my brother Bucknill and those gentlemen whose assistance this Court has, may have arisen from a form of question which appears by the judgment to have been the form Bucknill J. adopted. Because it will be observed that the question he put was this: "Supposing the *Leeuwarden* had done nothing except to proceed down under a steady helm on a steady down-river course, when she was shewing her starboard side to the up-coming ship, would there have been any collision at all, on the supposition, as I have found it, that the *Guildhall* was then acting under a steady starboard helm?" I hope it is not putting too wide an interpretation upon the rule to say that in my opinion I could understand this question being understood by the person to whom it was addressed in such a sense that he would fail to give a valuable skilled opinion in accordance with the rule. The meaning of the rule, as I understand the authorities, is that you are not to risk a collision. It is not meant to apply only to the case in which there certainly will be a collision if vessel A. sights vessel B. when they are approaching each other on opposite courses in the river Thames and they do not alter their courses. It is meant to apply when there is a reasonable risk of collision. Therefore, to ask the Elder Brethren would there have been a collision at all is really assuming just those points as certain which in practice in navigation in a river with a sinuous course cannot be properly treated as such. You may have barges, you may have, we are told, in this particular part, a set of the tide in one direction or the other; and further than that, this vessel the *Guildhall* had attached to her a tug at that time, although not actually towing—all of which are circumstances which, in the case of meeting ships, have to be considered. It was never intended that, if it could be shewn that placed as they are—if they exactly followed their courses, they might just escape colliding—that was a test as to whether this rule should or should not be obeyed. The answer the learned judge gives in his judgment as that of his assessors is, "No, there would not have been a collision, and the down-coming steamer would have passed safely starboard side to starboard side to the *Guildhall*." The fact that if everything had gone exactly as it might possibly have done they would not have touched seems to me, neither in reason nor authority, to afford a complete answer to the question as to whether it was a case in which the port helm rule should have been acted upon.

At the conclusion of his judgment Bucknill J. says: "I find, as a last fact, that at the time when the down-coming steamer ported her helm the two ships, being in the relative positions which I have found, were not proceeding so as to involve risk of collision, and, therefore, that the Thames rule as to porting did not apply." He had, as I have already said, stated earlier in his judgment the question to which he addressed himself, and to which the Elder Brethren addressed themselves. It is said that it ought to be assumed that when they were asked "would there have been a collison at all?" that they would understand "would there have been a risk of collision." But I am desirous of pointing out, from my own point of view, that the answers given by the assessors below may be explained, as they differ from the advice given to us, because they were in effect asked, "Assuming a certain position, that the *Leeuwarden* was to some extent slightly on the starboard bow of the *Guildhall* at a certain time, would there have been a collision?" and then,

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working it out, they say "No," upon the supposition that the *Leeuwarden* had remained on a steady helm on a steady down-river course. Yet, in my view, even if it was, in this sense, true that there would have been no collision, there might be a risk of collision within the meaning of reason and of the authorities. With regard to the authorities, I shall not refer again to *The Cleopatra* (1), except to quote the following passage in the judgment of Dr. Lushington: "According to my view of the statute, the meaning is this: Whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is reasonable probability of collision, it is their duty, unless there be some impediment, to obey the provision of the statute." Then comes the case which has been dealt with by my Lord, and with which he is for so many special reasons familiar—the case of *The Odessa* (2), in which quite clearly the relative bearings, which, had the vessels followed their courses, would not have shewn a prospect of any collision, were still held to be bearings which allowed, and indeed required, obedience to this rule. The only case that bears upon it since is that of *The Lady Wodehouse.* (3) It was there that—guarding against an interpretation too liberal, namely, that whenever vessels are coming in opposite directions they should port—Lopes L.J. in a short judgment at the end says: "It was probable that the *Presto* had acted on a misconception of the rule, it being, as the assessors said, a popular error that the rule applied in every case in which vessels were coming in opposite directions, whereas it only applied where they were likely to meet."

In this case we find, in a collision which took place only a short time afterwards, after the vessels had travelled a very short distance, the actual impact was an end-on impact—in other words, neither of them could have altered their course very much in the time. Making all allowance for possible heading to the northward of the *Guildhall*, owing, I think counsel for the respondents suggested, to the reversing action of the right-handed screw—making all allowance for that, it is practically an end-on blow, as appears to be practically agreed. Therefore, considering the very slight alteration that could have taken place from the time they sighted each other, the courses must have been so very close that the rule, in common sense, as well as by its terms, ought to have been acted on by the *Guildhall*, and consequently I think she was to blame. That is all I desire to add to the judgments which have been pronounced. I entirely agree that the fault, as fault I think there was, was the fault of the pilot. That pilot being a compulsory pilot, the owners are exempt, but, subject to that, I agree that on the point with which we have dealt the learned judge below has pronounced a judgment with which, for the reasons I have endeavoured to give, and with the strong advice of our assessors, I am unable to concur.

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(1) Swa. 135.

(2) 4 Asp. M. L. C. 493.

(3) (1886) 2 Times L. R. 252.

Appeal allowed with costs: Claim dismissed without costs; counter-claim with costs.

Solicitors for appellants (plaintiffs), owners of the *Leeuwarden*: *William Batham & Son.*

Solicitors for respondents (defendants), owners of the *Guildhall*: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

T. L. M.

Considered. CASEY v. CASEY. [1949] P. 420

C. A.

July 26, 27;
Oct. 14;
Nov. 18.

[IN THE COURT OF APPEAL.]

OGDEN v. OGDEN (OTHERWISE PHILIP).

Nullity of Marriage—Bigamy—Marriage in England between Englishwoman and Domiciled Frenchman—Irregularity by French Law—Decree of Nullity by French Court on Grounds unknown to English Law—Conflict of Laws—Lex loci contractus—Jurisdiction.

In September, 1898, a ceremony of marriage in English form was celebrated in England between a domiciled Englishwoman and P., a domiciled Frenchman. By a decree of the French Court in November, 1901, this marriage was annulled, on the ground that the consent of the parent, as required by French law, had not been obtained. P. subsequently married a Frenchwoman in France. In July, 1903, the Englishwoman instituted a suit in England for the dissolution of her marriage with P. on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. In October, 1904, the Englishwoman went through a ceremony of marriage in England with O., a domiciled Englishman, describing herself as a widow:—

Held (following *Simonin* v. *Mallac*, (1860) 2 Sw. & Tr. 67, and *Sottomayor* v. *De Barros*, (1879) 5 P. D. 94), that the lex loci contractus must prevail, and that this later marriage was bigamous and must be annulled at the suit of O.

Decision of Bargrave Deane J., [1907] P. 107, affirmed.

Quære whether, in circumstances like the present, the Court ought not to have assumed jurisdiction in the wife's suit for the dissolution of her first marriage by treating her as having a domicil in her own country sufficient to support a suit of this kind.

APPEAL from a decision of Bargrave Deane J. (1)

The question raised by this appeal was the effect of a decree of nullity of marriage by a French Court on a marriage solemnized in England between a domiciled Englishwoman and a domiciled Frenchman temporarily residing in England.

The facts as stated by Sir Gorell Barnes in the judgment of the Court of Appeal were as follows: The appellant, an Englishwoman who was domiciled in England, and whose maiden name was Sarah Helen Williams, on September 14, 1898, went through the ceremony of marriage at the registry office at Prestwich, in the county of Lancaster, with one Léon Philip, who was a French subject having a French domicil. At the time of the said ceremony he was temporarily resident in England in order to study English commerce and learn the English language. The ceremony took place without the knowledge either of his parents or of her parents. According to the marriage certificate, the appellant's age appears to have been twenty-five, and Philip's age was stated to have been twenty-two years, but as a matter of fact he was only nineteen. For a short time after the marriage the parties cohabited in England, and then it appears that the marriage became known to the appellant's father, who communicated with Léon Philip's father in France. In the result Philip's father came over to this country and took his son to France, where he has ever since remained.

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(1) [1907] P. 107.

The appellant became pregnant, by Léon Philip, of a child, which was born on July 7, 1899. Afterwards Léon Philip's father instituted proceedings in France to have the marriage annulled in accordance with certain provisions of the French Civil Code, to which it will be necessary to refer hereafter.

It is to be gathered from the decree of the French Court that the appellant made a claim that the marriage should take civil effect, and for alimony, and also for an allowance for the support of the child.

On November 5, 1901, a decree was pronounced in the proceedings at the Civil Tribunal of First Instance of the Seine, which recorded as to Léon Philip that, having come of age, he appeared personally in the proceedings, and, dealing with M. Philip, senior's, application to annul the marriage, the decree, after reciting that Léon Philip contracted the marriage in England at the age of nineteen years with Sarah Helen Williams, aged twenty-five years, on September 14, 1898, and that he could not by reason of his age marry without the consent of his father, his only surviving parent, and that he did not ask such consent; that, on the other hand, the said marriage was not preceded by any publication in France; that it is certain that such omission was intentional on the part of Léon Philip and Sarah Helen Williams, and with the object of eluding the requirements of French law so as to avoid the intended union being known to M. Philip, senior, and that the said marriage was therefore null according to articles 148 and 170 of the Code Civil, and that there was nothing to shew that it was afterwards ratified, either explicitly or implicitly, by M. Philip, senior; that the application to annul the marriage was admissible, seeing that Léon Philip declared that he abided by the order of the Court, and after reciting the application of the respondent, pronounced the annulment of the marriage of Léon Philip and the appellant with all its legal consequences, and declared the appellant's claim untenable, saving as concerned the custody of the infant, and nonsuited her as to the same, but gave her the custody of the infant and ordered Léon Philip to pay a maintenance of 50 francs a month for the child's support.

Although the appellant took the part mentioned in the decree in the French proceedings through her solicitors, she appears never to have been in France, and not to have been called as a witness in those proceedings.

After the decree Léon Philip married again in France, and thereupon the appellant, on July 21, 1903, instituted a suit in the Probate, Divorce and Admiralty Division of the High Court of Justice against Léon Philip for a dissolution of her alleged marriage with him on the ground of desertion and adultery. Her petition also asked for a declaration that her marriage was annulled. This case came on as an undefended case before Lord St. Helier (then Sir Francis Jeune) on July 5, 1904, and that learned judge dismissed the petition on the ground of want of jurisdiction. He appears to have held that, so far as the claim for divorce was concerned, he had no jurisdiction on the ground that the respondent to that suit was not domiciled in England; and, with regard to the claim for a declaration that the said marriage was annulled, it does not appear that any evidence was gone into as to the French law, nor as to the question of the validity of the marriage in England, and there seems to have been no decision whatever on the question of the validity of the marriage. It may be doubted whether the decision that the Court had no jurisdiction to entertain the claim for divorce was right, and the reason for this will be found stated towards the end of the present judgment.

On October 29, 1904, the appellant went through the ceremony

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of marriage with the present petitioner, William Henry Ogden, at a parish church in Lancashire, describing herself as a widow. She lived with Ogden for a time, and had a child by him. Later, on July 28, 1906, Ogden instituted the present suit against the appellant to obtain a decree of nullity of marriage on the ground that at the time of the ceremony of marriage between him and the appellant the said Léon Philip was alive, and that the marriage of the appellant and Léon Philip had not been annulled or dissolved for any cause competent to the law of England. There was upon the evidence in the case a dispute between Ogden and the appellant as to how much he knew, or was told, at the time he went through the ceremony of marriage with her, she asserting that she told him the whole of the facts which had occurred in relation to Léon Philip, and Ogden disputing this.

The appellant by her answer denied that she was lawfully married to Léon Philip, and pleaded that her marriage with him was declared null by the aforesaid decree. There was no dispute that at the time of the ceremony which took place between Ogden and the appellant Léon Philip was still alive, but according to her evidence she did not know the real age of Léon Philip at the time of the ceremony with him, and it did not appear that she had any knowledge of French law; and, as the facts appeared to the Court of Appeal, it must be taken that she had no such knowledge, and did not in fact intend to elude the requirements of that law.

The present case was heard before Bargrave Deane J., and on December 10, 1906, he pronounced a decree nisi, declaring the marriage between the petitioner and the appellant null and void on the ground that the appellant had a husband living at the time of her marriage with the petitioner. Bargrave Deane J. followed the cases of *Simonin* v. *Mallac* (1), and the decision of Lord Hannen in the case of *Sottomayor* v. *De Barros.* (2) From this decision the present appeal was brought.

The following articles from the French Civil Code were referred to in the course of the arguments and judgment:—

144. A man before the age of eighteen, and a woman before fifteen complete, are incapable of contracting marriage.

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(1) 2 Sw. & Tr. 67.   (2) 5 P. D. 94.

BIBL. [illegible]

148. The son who has not attained the full age of twenty-five years, the daughter who has not attained the full age of twenty-one years, cannot contract marriage without the consent of their father and mother; in case of disagreement, the consent of the father is sufficient.

149. If one of the two be dead, or disabled from manifesting his or her will, the consent of the other is sufficient.

150. If the father and mother are dead, or if they are disabled from manifesting their will (1), the grandfathers and grandmothers shall supply their place. If there be a disagreement between the grandfather and grandmother of the same line, the consent of the grandfather shall suffice; if the disagreement be between the two lines, this division shall have the effect of consent.

151. Where the children of a family have attained the majority fixed by article 148, they are required previously to contracting marriage to demand, by a respectful and formal act, the advice of their father and mother, or that of their grandfathers and grandmothers when their father and mother are dead, or disabled from manifesting their will.

152. From the majority fixed by article 148 to the age of thirty years completed for sons, and until the age of twenty-five years completed for daughters, the respectful act required by the preceding article, and on which consent to marriage shall not have been obtained, shall be twice more renewed from month to month; and one month after the third act it shall be lawful to proceed with the celebration of the marriage.

153. After the age of thirty years, it shall be lawful, in default of consent given upon a respectful act, to proceed, after the expiration of a month, with the celebration of the marriage.

Articles 165 to 169 contain provisions relating to the publications directed by article 63.

170. A marriage contracted in a foreign country between natives of France and between a native of France and a foreigner

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(1) Fr. "dans l'impossibilité de manifester leur volonté." As to the form of the "acte respectueux," see article 154 (modified in 1907). In article 183 the masculine "époux" is understood to include the feminine. A few verbal amendments have been made in the translation.—F. P.

shall be valid if celebrated according to the forms used in that country, provided that it has been preceded by the publications prescribed in article 63, under the title "Of acts of the civil power," and that the Frenchman has not infringed the regulations contained in the preceding chapter.

182. A marriage contracted without the consent of the father and mother, of the ancestors, or of the family council, in cases where such consent was necessary, can be impeached only by those whose consent was requisite, or by such of the two married persons as stood in need of that consent.

183. A suit for nullity is no longer maintainable either by the married persons, or by the relations whose consent was required, in those cases where the marriage has been approved, either expressly or tacitly, by those whose consent was necessary; or when a year has elapsed without complaint on their part, subsequently to their knowledge of the marriage. Such suit is no longer maintainable by a spouse after the lapse of a year without complaint on his part subsequently to his having attained the competent age for consenting to the marriage in his own person.

185. Nevertheless a marriage contracted by parties who have not yet reached the required age, or of whom one has not attained that age, is no longer liable to be impeached, first, where six months have expired since the married person or persons have attained the competent age; secondly, where the woman not having reached that age has conceived before the expiration of six months.

201. A marriage which has been declared null is attended, nevertheless, by civil consequences, as well with regard to the married parties as to their children, where the marriage has been contracted in good faith.

202. Where good faith exists only on the part of one of the married persons, the marriage is only attended by civil consequences in favour of that person, and the children of the marriage.

The appeal was heard on July 26 and 27 and October 14.

Sir Edward Clarke, K.C., and *Bayford*, for the appellant. A marriage celebrated according to the forms required by the local law is valid universally unless one or both of the parties is or are by the law of his, her, or their domicil incapable of contracting such marriage. It follows that a marriage celebrated in England according to the forms of that country is only valid if such party thereto is by the law of his or her domicil capable of celebrating such marriage.

[SIR GORELL BARNES, PRESIDENT. The language of your proposition is ambiguous. Here the man was merely incapable according to the law of his own country until he got his parents' consent. The want of consent is not incapacity; it is want of compliance with a formality.]

It is submitted that under article 148 of the French Civil Code the man was under a personal incapacity to marry without that consent. In *Scrimshire* v. *Scrimshire* (1) stress is laid upon the importance of a marriage being held good or bad everywhere, and that decision is recognized in *Harford* v. *Morris*. (2) Assuming that article 148 goes to the question of capacity, *Brook* v. *Brook* (3) is in point. There a marriage contracted abroad by domiciled English subjects was held to be void because the man was marrying his deceased wife's sister.

[SIR GORELL BARNES, PRESIDENT. That is an exception based on prohibited degrees.]

Bargrave Deane J. proceeded upon *Simonin* v. *Mallac* (4); but that case is distinguishable from the present, because there both the parties had attained the majority fixed by article 148, and the only objection to the marriage was that they had omitted to ask the consent of their relations, as required by article 151, although if they had observed the formalities required by that article they could ultimately marry without such consent: article 152; and this distinction was pointed out by Cresswell J. in that case. Therefore in that case there was no such incapacity as there is here. In *Sottomayor* v. *De Barros* (5) it was originally assumed that both parties were domiciled Portuguese, and that the marriage, which was celebrated in England, was within the prohibited degrees according to the law of Portugal, though not according to the law of England. On that assumption the case was tried before Sir R. Phillimore, who felt himself bound by *Simonin* v. *Mallac* (1) to hold that the Court of the place where the marriage was celebrated was not bound to recognize the incapacities affixed by the law of the domicil on the parties, and he accordingly declared the marriage valid; but his decision was reversed by the Court of Appeal, who set aside the marriage, and distinguished *Simonin* v. *Mallac* (1) on the ground that the question there was one of form, and not of capacity. The case came on again before Lord Hannen, after it had been proved that the husband at the date of his marriage was domiciled in England, and that learned judge held that the marriage was valid. It is submitted that that decision violated the principles of the previous judgment of the Court of Appeal in the same case and was wrong, and that the point was really the same as in *Mette* v. *Mette* (2), where the decision was the other way. In the judgment of the Court of Appeal in *Sottomayor* v. *De Barros* (3) it is treated as a settled principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. That principle applies here. *Simonin* v. *Mallac* (1) is really inconsistent with it. That case was reluctantly followed by Sir R. Phillimore, who was reversed on appeal, and was again followed by Farwell J. in *Hay* v. *Northcote* (4); but it has never been followed by the Court of Appeal, and, unless distinguishable from the present case, it is submitted that it is wrong and ought to be overruled. *Scott* v. *Attorney-General* (5) and *Warter* v. *Warter* (6) are also inconsistent with *Simonin* v. *Mallac*. (1)

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(1) (1752) 2 Hagg. Cons. 395, 416.

(2) (1776) 2 Hagg. Cons. 423, 431.

(3) (1861) 9 H. L. C. 193.

(4) 2 Sw. & Tr. 67.

(5) (1877) 2 P. D. 81; 3 P. D. 1; (1879) 5 P. D. 94.

[KENNEDY L.J. It is noticeable that the character of the incapacity in this case is such as to render the marriage voidable only, and not void: article 182. It is not like an incestuous alliance.]

Assuming that this marriage was valid by the English law, upon that marriage the wife acquired her husband's domicil,

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(1) 2 Sw. & Tr. 67.
(2) (1859) 1 Sw. & Tr. 416, 423.
(3) 3 P. D. 1, 5.
(4) [1900] 2 Ch. 262.
(5) (1886) 11 P. D. 128.
(6) (1890) 15 P. D. 152

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and the marriage has now been declared null and void by a decree of the French Court. The French Court has jurisdiction to make that decree, and the wife appeared and submitted to the decision. That was a judgment in rem, and is valid universally: *Harvey* v. *Farnie* (1); *Niboyet* v. *Niboyet* (2); *Bater* v. *Bater* (3); *Pemberton* v. *Hughes* (4); *Sinclair* v. *Sinclair*. (5) The French Court must be considered quite as competent with regard to nullity as divorce; and the judgment of a competent Court must be recognized in this Court. The status of a person must be decided by the Court of his or her domicil.

[SIR GORELL BARNES, PRESIDENT. In a nullity case like this the decree is only a declaration of the status of the parties in France.]

It was a decision on the ground of incompetence under French law, binding on all parties and on all Courts in all countries. Where the Court of the husband's domicil has pronounced on the status of the parties, that decree is recognized as binding in this country: *Armitage* v. *Attorney-General*. (6) In *Simonin* v. *Mallac* (7) the question of the effect of the French decree was not considered, and the question of domicil was not dealt with. For present purposes there is no distinction between a sentence of nullity and a decree for divorce; each affects the status of the person, and status is properly dealt with by the Court of the domicil.

Middleton, for the petitioner, the respondent on the appeal. The lex loci contractus, viz., England, determines the validity of the first marriage, and that law is to prevail by which the parties intended to be bound, i.e., the lex loci. There is no reason shewn in the cases on domicil which have been cited for setting this contract aside. The "res" was never in the jurisdiction of the French Courts, and therefore the decree cannot be a declaration or judgment in "rem." Regard will not be had to the opinion of a foreign Court on an English marriage ceremony: *Sinclair* v. *Sinclair*. (5) That the law of the place where

(1) (1882) 8 App. Cas. 43.
(2) (1878) 4 P. D. 1.
(3) [1906] P. 209.
(4) [1899] 1 Ch. 781.
(5) (1798) 1 Hagg. Cons 294.
(6) [1906] P. 135.
(7) 2 Sw. & Tr. 67.

the contract is made is to prevail is clear from a long chain of authorities, and this is recognized in *Scrimshire* v. *Scrimshire* (1), *Harford* v. *Morris* (2), and *Middleton* v. *Janverin.* (3) In nullity cases domicil is not the test: *Linke* v. *Van Aerde* (4) and *Roberts* v. *Brennan* (5), which shews that *Niboyet* v. *Niboyet* (6) still applies to nullity cases. *Simonin* v. *Mallac* (7) and *Sottomayor* v. *De Barros* (8) cover this case, and are in favour of the petitioner. The respect shewn to the lex loci contractus is also shewn in *Dalrymple* v. *Dalrymple* (9) and *Kent* v. *Burgess.* (10) That the consent of the parents of Léon Philip was not essential seems clear from *Sottomayor* v. *De Barros.* (8) The lex loci is the governing rule in deciding upon the validity or invalidity of all personal contracts: *Warrender* v. *Warrender.* (11) The intention of the parties when entering into the contract must be looked at in order to arrive at the law by which the contract must be construed: *Hamlyn & Co.* v. *Talisker Distillery.* (12)

The cases relied on for the appellant are all distinguishable; in none of them was the validity of the marriage disputed. Those cases merely shew that this Court recognizes the authority of a foreign Court to dissolve an English marriage for some cause which has accrued since the marriage, when also the domicil of the parties has been changed since the marriage.

Sir Edward Clarke, K.C., in reply. If the marriage was not a nullity from the first, why should the French Court make any declaration of its nullity, as was done in *Andrews* v. *Ross*? (13) In that case their judgment altered the status of the parties, just as much as a decree for divorce does.

The provisions in the French Civil Code against marriage without consent impose a personal incapacity to contract, and the marriage was invalid because Léon Philip was incapable of

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(1) 2 Hagg. Cons. 395, at p. 412.

(2) 2 Hagg. Cons. 423.

(3) (1802) 2 Hagg. Cons. 437.

(4) (1894) 10 Times L. R. 426.

(5) [1902] P. 143.

(6) 4 P. D. 1.

(7) 2 Sw. & Tr. 67.

(8) 5 P. D. 94.

(9) (1811) 2 Hagg. Cons. 54.

(10) (1840) 11 Sim. 361.

(11) (1835) 2 Cl. & F. 488, at p. 529.

(12) [1894] A. C. 202.

(13) (1888) 14 P. D. 15.

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entering into the marriage contract. Capacity to contract must be tested by the law of the domicil; and the Court of the domicil has decided that this marriage was null and void for all purposes everywhere, and that decree is binding on this Court and all other civilized Courts.

Cur. adv. vult.

Nov. 18. The judgment of the Court (Cozens-Hardy M.R., Sir Gorell Barnes, President, and Kennedy L.J.) was delivered by

Sir Gorell Barnes, President. This is an appeal in a case of considerable importance and interest, more especially to persons in this country who have entered into, or contemplate entering into, matrimonial relations with foreigners. The facts which give rise to the question are these. [Having stated the facts as above set out, his Lordship continued :—] The case was very fully and ably argued by counsel on behalf of the respective parties, and two points were made for the appellant by her counsel, Sir Edward Clarke; the first, that her marriage with Léon Philip was not valid, inasmuch as, although the marriage was celebrated according to the forms required by the law of England, it was invalid both in this country and in France, because Léon Philip was, by the law of France, being the law of his country and his domicil, incapable of contracting the marriage; the second, that the effect of the French decree was to annul the marriage, both in France and in this country. If both or either of these points were established in favour of the appellant, the contention on her part which followed as a matter of course was that at the time of the ceremony of marriage between herself and Mr. Ogden she was free to contract a marriage with him, and that, therefore, her marriage with him was valid, and his petition should be dismissed.

Evidence was given at the trial of the French law upon which the appellant relied. The French Civil Code was put in, and various sections of that Code were referred to on the argument of this appeal, to some of which it is necessary to draw attention. By article 1, s. 3, the laws relating to the condition and privileges of persons govern Frenchmen although residing in a foreign country. By Title II., s. 63, two publications with an interval of eight days between them have to be made, containing particulars of the proposed marriage. Title V. contains (inter alia) provisions which, translated into English, are as follows. [Having read the articles from the French Civil Code set out above, his Lordship proceeded :—] It would seem from these provisions that a marriage without the necessary consent or publication is not made by the Code void from the outset, but will only be declared void if proceedings for that purpose are taken by the proper parties in proper time, and will be valid unless the declaration is made.

These being the facts and the points raised, counsel for the appellant endeavoured to support his first point by urging before the Court certain propositions which were wider than that which it is necessary to consider for the purpose of determining the present case. It is not necessary in this case to consider what are the principles which ought to govern a decision in England upon the question of the validity in this country of a marriage celebrated therein between two foreigners domiciled abroad and incapable by the law of their domicil of marrying each other at all. It is not even necessary for the decision of this case to consider what has been or ought to be decided as to the validity of a marriage entered into in England between two foreigners domiciled abroad where they have come to this country in order to avoid a difficulty with regard to formalities which are required by the law of their domicil for the celebration of a valid marriage in their own country.

The simple question for determination in the present case upon the first point is whether or not a marriage taking place in England between an English person domiciled in England with a foreigner temporarily residing in this country, which it was not disputed would be held in England to be a valid marriage if celebrated between two inhabitants of this country, ought to be held invalid on the ground that the foreigner was by the statute law of his country subjected to the necessity of complying with certain formalities in order to be at liberty to enter into the marriage. It is desirable to state this limited proposition very clearly, because, with regard to questions which may be raised

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as to the validity of marriages in England between persons domiciled abroad, certain cases have been decided (to which reference will be made further on in this judgment) which do not necessarily involve the consideration of the particular point already indicated, or any decision thereupon; and it is desirable, therefore, to avoid the confusion which appears to have arisen sometimes between the consideration of the principles which have been laid down for determining the validity of a marriage where the ceremony alone was in question, and of those which have been considered, in determining whether it was lawful for the parties to intermarry at all.

Now, the argument for the appellant in the present case was that, although the marriage between her and Léon Philip was celebrated according to the forms required by the English law, it was invalid universally because Léon Philip was a minor in France, and under a disability by the law of France from contracting such marriage without the consent of his father, and without complying with the other formalities required by the law of France. In substance this contention amounted to this—that in regard to entering into a marriage in England with an inhabitant thereof, Léon Philip carried with him into this country an incapacity, which ought to be recognized by the law of England, to enter into matrimonial relationship with such inhabitant without complying with the provisions of the French Code. It was urged that this principle had been recognized in this country, and cases were cited which it was said supported the contention. The cases cited, however, do not support it, and in truth the argument on behalf of the appellant appears to be based upon views which have been expressed by foreign jurists, but which have not been adopted in this country, where the English Courts have not been very ready to admit a personal law of status and capacity dependent on domicil, and travelling with the person from country to country, although there has been, perhaps, less unwillingness in later years to give effect to the lex domicilii to some extent: see, for instance, *In re Goodman's Trusts*. (1)

It may be doubted whether there is much substantial difference of opinion between foreign and English jurists as to the general rule that between persons sui juris the validity of the marriage is to be decided by the law of the place where it is celebrated. There are certain exceptions, as, for instance, when the lex loci celebrationis violates the precepts of religion, or of public morals, as in the case of bigamy, or where the marriages are such as are generally recognized as incestuous. When, however, the competency of the parties to contract marriage is considered, there appears to be a diversity of opinion, not merely between foreign jurists and English jurists, but amongst the foreign jurists themselves, certain foreign jurists, but not all, maintaining that a person who is in his minority by the law of his native or acquired domicil is to be deemed everywhere in the same state or condition. This appears to be based upon the conception that the laws which have for their object the regulation of the capacity of persons are to be treated as personal laws and of absolute obligation everywhere when they have once attached upon the person by the law of his domicil. This conception would appear to result from the application of principles derived from sources of law different from those from which the English common law has been derived, and from considerations which have not had the same force in this country as abroad. Story J., however, notices that many exceptions are admitted to exist as to the operation of personal laws, and that the practice of nations by no means justifies the doctrine in the extent to which it is ordinarily laid down by many foreign jurists. (1) That learned writer discusses this question at great length in the work to which reference has been made, and makes the following general observations in s. 76 on the inconvenience of allowing the law of the domicil to govern contracts made in other countries. He says: "How are the inhabitants of any country to ascertain the condition of a stranger dwelling among them as fixed by the law of a foreign country where he was born or had acquired a new domicil? Even Courts of justice do not assume to know what the laws of a foreign country are; but require them to be proved. How, then, shall private persons be presumed to have better means of knowledge? On the other hand, it may be said, with

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(1) (1881) 17 Ch. D. 266.

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(1) Story on the Conflict of Laws, s. 54.

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great force, that contracts ought to be governed by the law of the country where they are made, as to the competence of the parties to make them, and as to their validity; because the parties may well be presumed to contract with reference to the laws of the place where the contract is made and is to be executed. Such a rule has certainty and simplicity in its application. It ought not, therefore, to be matter of surprise if the country of the parties' birth should hold such a contract valid, or void, according to its own law, and that nevertheless, the country where it is made and to be executed should hold it valid or void, according to its own law. It has been well observed by an eminent judge that 'with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts of that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement.'" And again, in s. 75, he quotes from a judgment of Porter J. in the case of *Saul* v. *His Creditors* (1) as follows: "Suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided, and that at the age of twenty-four he came into this State, and entered into contracts, would it be permitted that he should, in our Courts and to the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge? And would we tell them that ignorance of foreign laws in relation to a contract made here was to prevent them from enforcing it, though the agreement was binding by those of their own State? Most assuredly we would not." And again, in s. 90, he observes: "The difficulty of applying any other rule as to the capacity and incapacity of the person, in respect to the class of nuptial contracts, will become still more clear by attending to the great extent of the parental power recognized by the Continental nations of Europe, and derived by them from the civil law. Parental restraint upon the marriage of minors exists to a very great extent in Germany, Holland, France, and other civil law countries; to so great an extent indeed that the marriage of minors without the consent of their parents, or at least of their father, is absolutely void" (*sed quære*, should not the learned author have said voidable; see observations above), "and the disability of minority is in these countries carried to a much greater age than it is by the common law. In some of these countries majority is not attained until thirty, and until a very recent period, even in France, the age of majority of males was fixed at twenty-five and of females at twenty-one. It is now fixed at twenty-one in all other cases except for the purpose of contracting marriage, and a marriage cannot even now be contracted in France by a man until twenty-five years of age, and by a woman until twenty-one, without the consent of their parents, or at least of their fathers, if the parents differ in opinion. Yet France has ventured upon the bold doctrine that the marriages of Frenchmen in foreign countries shall not be deemed valid if the parties are not by its own law competent to contract by reason of their being under the parental power. There can be little doubt that foreign countries where such marriages are celebrated will follow their own law and disregard that of France."

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(1) (1827) 5 Martin, N. S. (La.), 569, at pp. 596-8.

It would needlessly lengthen this judgment to set out the passages from foreign jurists bearing upon this subject, and it is not necessary to examine at length those cases or those passages in the above-mentioned work or other commentaries which deal with cases in which a marriage is entirely prohibited by the laws of the domicil of both or either of the parties, and yet is permitted by the laws of the place of celebration, for we are concerned in this case only with the question of a disability imposed by foreign law upon one of the parties to the marriage in respect only of want of parental consent, and compliance with certain formalities required by such foreign law.

There appears to be no case in this country (certainly no case was cited to us in argument on this appeal) in which in such a case as last mentioned the view has been expressed that such a

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marriage would be held invalid in this country. We know of no principle recognized by English law which would justify the Court in coming to the conclusion that such a marriage ought to be held invalid; for, although to a certain extent the lex domicilii is recognized in this country, for instance, in the familiar case where it is held that mobilia sequuntur personam, yet such recognition appears never to have been extended to the case of a matrimonial engagement entered into in this country between an inhabitant of another country and an inhabitant of this country. In such a case, where there are two different systems of law, one may well ask, which is to prevail? Why should it be recognized that a person who comes over to this country and validly enters into a marriage with one of its inhabitants according to English law should be held unable to do so here because of the regulations of a foreign system of jurisprudence which places upon him a personal incapacity to contract unless he complies with formalities required by the foreign law?✓ It may be observed here that the 3rd section of article 1 of the French Civil Code ordains that the French laws relating to the conditions and privileges of persons are to govern Frenchmen although residing in a foreign country, so that it would seem from this provision that the French rule as to competency by reason of minority is not based upon domicil, but upon nationality, and therefore that even in the case of a Frenchman domiciled in England celebrating a marriage with a domiciled Englishwoman the French Courts would be at liberty, if the question arose before them, to declare such a marriage null and void, on the ground that it was governed by the laws of France, although celebrated in this country; but it could hardly be contended in England, if both persons parties to a marriage were domiciled in this country, that our Courts ought to hold such a marriage invalid because one of the parties by the laws of his or her nationality may not have adequate competency to enter into the contract.

It is necessary now to refer to some of the cases which were cited in the course of the argument, though none of them when examined can be considered to support the contention of the appellant upon the first question, but before doing so it should be observed that the Court has, in a suit for nullity, by s. 22 of the Matrimonial Causes Act, 1857, to "proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief." Upon the question, however, of validity of marriage under consideration there is no reason for supposing that there was any difference between the principles and rules applicable to the question in the ecclesiastical Courts and in the Courts of common law.

The first case to refer to is *Herbert* v. *Herbert* (1), where Lord Stowell in his judgment said: "It being an established principle that every marriage must be tried according to the law of the country in which it took place; this is according to the jus gentium: whatever the regulations may be, according to which the marriage has been had, if they are what the canonical law of the foreign country supports, the canonical law of this country must enforce it." The language of this judgment as reported in 2 Hagg. Cons. at p. 271 is not quite the same, but is substantially to the same effect.

The case of *Scrimshire* v. *Scrimshire* (2) appears to have been heard in 1752, but is reported from a manuscript note of Sir Edward Simpson communicated by Dr. Swabey. The question raised in it was as to the validity of marriages of British subjects contracted abroad. Sir William Wynne, in *Middleton* v. *Janverin* (3), states that he remembered to have heard that the judgment was founded on great deliberation, and that Lord Hardwicke L.C. was consulted on it. In the course of that judgment Sir Edward Simpson said: "From the doctrine laid down in our books—the practice of nations and the mischief and confusion that would arise to the subjects of every country from a contrary doctrine, I may infer that it is the consent of all nations, that it is the jus gentium, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule where one party is

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(1) (1819) 3 Phill. 58, at p. 63.

(2) 2 Hagg. Cons. 395, 416.

(3) 2 Hagg. Cons. 437, at p. 446.

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domiciled and the other not? The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court, observing that law in determining upon this case, cannot be said to determine English rights by the laws of France but by the law of England, of which the jus gentium is part. All nations allow marriage contracts, they are juris gentium, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries, that is, the law where the contract is made. By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not." And further on: "Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage, undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France, and the marriage should be declared null because the man was not domiciled, he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind the matter of domicil makes no sort of difference in determining them; because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not."

The terms of article 1, s. 3, of the French Code shew how these principles differ from those upon which it is based.

The principle indicated in this judgment appears to have been adopted in the judgment of Lord Brougham in the House of Lords in the case of *Warrender* v. *Warrender*. (1)

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(1) 2 Cl. & F. 488, at p. 529.

The case of *Brook* v. *Brook* (1) was much relied upon by the appellant's counsel. That case, however, so far from supporting the contention of the appellant, is when carefully considered a decision adverse to her. The case raised a similar point to that which had been raised in *Mette* v. *Mette* (2), with two distinctions—first, that the man in the latter case was not a natural born subject of the realm, although domiciled in England and naturalized by Act of Parliament; secondly, that the deceased wife's sister was a native of Frankfort, and until her marriage domiciled there. The facts in the case of *Brook* v. *Brook* (1) are shortly stated in the head-note to the report as follows: "A. and B., British subjects, intermarried. B. died. A. and C. (the lawful sister of B.), both being at the time lawfully domiciled British subjects, went abroad to Denmark, where by the law the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married, and it was held that under the provisions of 5 & 6 Will. 4, c. 54, the marriage in Denmark was void."

In consequence of the recent Act legalizing marriage with a deceased wife's sister, these two cases have become unimportant so far as they affected such a marriage, but the grounds upon which they were decided are still applicable to marriages within other degrees of consanguinity or affinity declared void by the aforesaid statute, and on these grounds, in the case of *De Wilton* v. *Montefiore* (3), Sir James Stirling held that a marriage solemnized abroad according to Jewish rites between a niece and her natural uncle, both being domiciled British subjects and adherents of the Jewish faith, was invalid, although it was valid by the law of the place of celebration and by Jewish law.

The decisions in those cases did not depend upon the question which is now under consideration, but upon whether or not the marriages, entirely prohibited, at the time, by the law of this country, were to be held valid because the parties thereto had entered into marriage relationship in a country where such marriages were permitted. It would not follow from these decisions that the marriages would have been held invalid in the countries in which they were celebrated. The case of *Brook* v. *Brook* (1) was a decision binding in this country, but it may be noticed that it has not met with approval in America, where it was very fully discussed and criticized in a learned judgment by Gray C.J. in the case of the *Commonwealth* v. *Lane*. (2) In that case a man, who had been lawfully married in Massachusetts and whose wife had obtained a divorce from him on the ground of adultery, in which case he was prohibited by the statutes of the State from marrying again without the leave of the Court, and who, without having obtained the leave of the Court, and being still a resident in Massachusetts, was married to another woman in another State according to its laws, and afterwards cohabited with her in the State of Massachusetts, the first wife being still alive, was indicted for bigamy, but was held not guilty without proof that the second wife was resident in the State of Massachusetts, and that he and she went into the other State to evade the provisions of the statutes of the State of Massachusetts. This proof was required by s. 6 of Gen. Sts. c. 106, which would seem to have been passed with the express object of preventing such second marriages, if such proof could be given.

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(1) 9 H. L. C. 193.

(2) 1 Sw. & Tr. 416.

(3) [1900] 2 Ch. 481.

There are several cases of a similar nature in America, amongst them *Ponsford* v. *Johnson* (3), *Van Voorhis and Brintnall* (4), and *Moore* v. *Hegeman*. (5)

It is possible that those cases might have been decided upon principles analogous to those applied in *Scott* v. *Attorney-General* (6)—distinguished in *Warter* v. *Warter* (7)—viz., that the restriction upon a second marriage was penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted. But Gray C.J., in his judgment in *Commonwealth* v. *Lane* (2), appears to have based his decision upon the broad ground of the second marriage being in accordance with the lex loci contractus.

The reason why the case of *Brook* v. *Brook* (1) may be considered to be adverse to the appellant is that the distinction is

(1) 9 H. L. C. 193.
(2) (1873) 113 Mass. 458.
(3) (1847) 2 Blatchford's Rep. 51.
(4) (1881) 86 N. Y. 18.
(5) (1883) 92 N. Y. 521.
(6) 11 P. D. 128.
(7) 15 P. D. 152.

there drawn between the question of the validity of a marriage absolutely prohibited by the law of the domicil of both parties and the case in which a marriage, valid by the law of the place of celebration if it took place between two inhabitants of that place, is called in question because one of the persons is domiciled abroad, and has not complied with certain forms and obtained certain consents required by the law of the place of his or her domicil. The Lord Chancellor (Lord Campbell) said (1): "There can be no doubt of the general rule that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated." Again, in commenting upon the case of *Simonin* v. *Mallac* (2) next hereinafter referred to, Lord Campbell remarks (3): "The objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoleon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case"—that is, the case of *Simonin* v. *Mallac* (2)—"therefore comes into the same category as *Compton* v. *Bearcroft* (4) and *Steele* v. *Braddell* (5), decided by Dr. Radcliff. None of these cases can shew the validity of a marriage which the law of the domicil of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled."

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(1) 9 H. L. C. 193, at p. 207.

(2) 2 Sw. & Tr. 67.

(3) 9 H. L. C. 193, at p. 218.

(4) (1769) 2 Hagg. Cons. 444, n.

(5) (1838) Milw. Ecc. Rep. (Ir.) 1.

It was contended that *Simonin* v. *Mallac* (1) was wrongly decided, and therefore it is desirable to refer to it in some detail. It was a suit for a declaration of nullity of marriage. The ceremony of marriage took place on June 21, 1854, between the petitioner and Léon Mallac at the parish church of St. Martin's-in-the-Fields, Middlesex, Léon Mallac being of the age of twenty-nine years, and the petitioner aged twenty-two. They came over to London for the purpose of being married, and returned to France the next day. The marriage was not consummated, and the petitioner asked Mallac to marry her again in France, but he refused, and she instituted a suit before the Civil Tribunal of First Instance of the Seine to procure a decree of nullity of the alleged marriage. On December 1, 1854, a decree was made, by default, against the respondent, who did not appear, declaring the marriage null and void on the ground that by the words of article 170 of the French Code the marriage ought to have been preceded by the publication in France prescribed by law, and that there must not have been any contravention of the provisions of articles 144 and following of the said Code, and that, although the nullity provided for by article 170 was not absolute, it ought to be pronounced when an omission of formalities had taken place with the formal intention of eluding the law, it being the province of the Tribunal to appreciate the circumstances thereof, and that the marriage was celebrated without the consent of the parents and without having been preceded in France by the publications prescribed by article 63 of the Code, and that the parties were French subjects domiciled in France who had only proceeded to England for the purpose of contracting a marriage in order to evade the prescriptions of French law, and that the marriage had not been consummated. Afterwards the petitioner came to reside in England, and petitioned the Court for Divorce and Matrimonial Causes for a decree of nullity of marriage. The petition and citation were served on the respondent at Naples, but he put in no answer, and the case came on before the Full Court as an undefended case. It was argued by Dr. Phillimore, evidently at great length and with great learning. Numerous authorities, both English and foreign, were cited, but the Court, composed of Sir Cresswell Cresswell, Channell J. and Keating J., dismissed the petition. In the course of the judgment Sir Cresswell Cresswell (delivering the judgment of the Court), in dealing with the second question to be determined—viz., whether the marriage was to be held null and void—said that, so far as the Court had been able to ascertain, the question was one primæ impressionis, that no decision upon the point was cited, and they had not had the benefit of any other diligence save their own in the attempt to discover precedents for their guidance. The case was a stronger case in favour of the petitioner than the present case is in favour of the present appellant, for both the parties in that case were French subjects and of French domicil.

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(1) 2 Sw. & Tr. 67.

The argument was very much the same as that which was addressed to this Court, viz., that the law of the country of the domicil placed on the parties an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity travelled with them everywhere, and rendered them incapable of making a valid contract in any other country, especially where the intention was to evade the law of their own country. In the course of the judgment it was noticed that according to the evidence the incapacity to contract was not absolute, but conditional only, and that the marriage, having been contracted between a man and woman of the respective ages of twenty-nine and twenty-two without attending to the formalities prescribed by the Code Napoléon, articles 151, 152, 153, and 154, might receive a different consideration from one absolutely prohibited by article 148 by parties respectively under those ages. The Court, however, dealt with the case on the broad ground that by the decree of the French Court, as evidenced by the law of France, the marriage was void, and the question considered was whether the marriage was to be judged of here by the law of France or by the law of England. The learned judge said: "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended

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that such rule does not extend to contracts of marriage; and that parties are, with reference to them, bound by the law of their domicil. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage good by the law of the country where solemnized should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz., marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, e.g., by our Royal Marriage Act." He then refers to the third exception mentioned by Story in s. 113A, viz., "marriages celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country"; and continues: "In several instances, learned judges presiding in our Ecclesiastical Courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But inasmuch as none of the cases referred to fell within the exceptions above mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it." He proceeded further to refer to the cases of *Scrimshire* v. *Scrimshire* (1) and *Middleton* v. *Janverin* (2), and the writings of some of the jurists, especially Huber, De Conflictu Legum, from which he quotes, at p. 81, a passage upon which he remarks that Huber does not suggest the slightest doubt as to the marriages of minors without consent, celebrated in countries whither they had gone for the purpose of evading the laws of the country of domicil, being held good in the country where solemnized; but,

(1) 2 Hagg. Cons. 395.

(2) 2 Hagg. Cons. 437.

with reference to the second class, vindicates the country of the domicil against the charge of violating the laws of nations by refusing to recognize them. He then refers to certain other cases, and thus proceeds: "The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law. . . . . Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories, and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? . . . . Assuming then that a French subject comes to England and there marries, without consent, the subject of another foreign country by the laws of which such a marriage would be valid, which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English; would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law?" After pointing out the difficulties which would arise if parties were called upon to prove their ages, the consent of certain relations, or the non-existence of certain relations, or that they have not come to this country to evade the laws of their own, and other difficulties, he concludes thus: "The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion

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of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects. France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the comitas or jus gentium, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all." That case is in accordance with the general views to be found expressed in the English decisions, and has met with approval in this Court and in the House of Lords, or at least it may be said that where mentioned in those tribunals it has not been dissented from.

The case principally relied on by the appellant was the case of *Sottomayor* v. *De Barros* (1), before Sir Robert Phillimore, and afterwards on appeal before the Court of Appeal, where the petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the City of London, and in 1873 they returned to Portugal, and continued to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid. The wife afterwards, while residing with her parents at Lisbon, filed a petition in this country for a declaration of nullity of marriage. The respondent appeared, but did not file an answer, and the matter came on unopposed before Sir Robert Phillimore, who directed that the papers should be sent to the Queen's Proctor, in order that he might argue the questions raised, and the Queen's Proctor thereupon appeared. The questions were argued, and in the result Sir Robert Phillimore felt himself bound by prior decisions, and especially that in *Simonin* v. *Mallac* (2), and dismissed the petition.

The petitioner appealed to the Court of Appeal. The judgment

(1) 2 P. D. 81; 3 P. D. 1.

(2) 2 Sw. & Tr. 67.

of the Court, consisting of James, Baggallay, and Cotton L.JJ., was delivered by Cotton L.J., and one of the principal arguments addressed to us upon this appeal was based upon that judgment. The decision of the Court below was reversed. The basis of that judgment is to be found in the following sentence at p. 5 of the report: "But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

Now this Court hearing this appeal is bound by the decision of the Court of Appeal in this case of *Sottomayor* v. *De Barros*. (2) It is not necessary, even if we were at liberty to do so, to consider whether that case was rightly decided, but it is permissible to point out that the commencement of the paragraph above set out could scarcely be considered correct in stating that "it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil," for, if so, it would logically seem to follow that that part of the judgment which indicates that the opinion of the Court was confined to cases where both the contracting parties

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(1) 2 P. D. 81; 3 P. D. 1.

were, at the time of their marriage, domiciled in a country, the laws of which prohibited their marriage, should not have expressed that limitation, and that the case of *Simonin* v. *Mallac* (1) should have been overruled, and yet that case, according to our reading of the judgment, is approved. The probability is that that sentence should be read with the context, and be confined to the case present to the minds of the Court in relation to marriages which could not be contracted at all by the laws of the country of domicil. Even then it may be questioned whether that sentence is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both the parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity, and it may, perhaps, not be unreasonable for one country to refuse to recognize a marriage contracted in it between two persons by the laws of whose domicil a marriage between them is illegal, and yet it may be quite proper and reasonable for a country, in which a marriage takes place between persons domiciled in another country, to recognize it as a valid marriage when it would be legal in such other country if contracted after compliance with all formalities required in such other country, and, further, to protect its citizens in all cases of marriages where one of the contracting parties is domiciled in the country first referred to—that is to say, where the marriage takes place—and the other is domiciled in a foreign country, and there is a conflict between the laws of the two countries as to the validity of the marriage. The passage in the judgment expressly confining the decision to the case then before the Court is as follows: "It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of prohibitions imposed by the law of the domicil of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of any personal incapacity not recognized by the law of this country."

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(1) 2 Sw. & Tr. 67.

It was upon this passage that, when the case subsequently came before Lord Hannen, he was able to decide in favour of the marriage being valid notwithstanding the fact that one of the parties was domiciled in Portugal.

The concluding passage in the judgment of the Court of Appeal is as follows: "It only remains to consider the case of *Simonin* v. *Mallac*. (1) The objection to the validity of the marriage in that case, which was solemnized in England, was the want of consent of parents, required by the law of France, but not under the circumstances by that of this country. In our opinion this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage, and the decision in *Simonin* v. *Mallac* (1) does not, we think, govern the present case."

That may perhaps be considered only a dictum by the learned Lords Justices, but it is really a very strong statement that *Simonin* v. *Mallac* (1) is clearly distinguishable from the case before them, and we regard it as an approval of the decision in that case, and, if so, it is an authority adverse to the contention of the appellant on the present appeal. The case having been thus argued in the Court of Appeal by the Queen's Proctor, under the provisions of s. 5 of the Matrimonial Causes Act, 1860, was remitted to the Probate Division in order that the question of fact raised by the Queen's Proctor's plea should be considered. It was then heard before Lord Hannen, who found, as a fact, that the respondent, the husband, was domiciled in England, but that the domicil of the petitioner was Portuguese.

In the course of his judgment he pointed out how the passage in the judgment of the Court of Appeal expressly confining the decision to the case then before the Court left him free to consider

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(1) 2 Sw. & Tr. 67.

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whether the marriage of the respondent, who was domiciled in England, with a woman subject by the law of her domicil to a personal incapacity not recognized by English law, must be declared invalid by the tribunals of this country, and he commented (1) upon the passage in the judgment which formed the basis of the decision, and remarked that it appeared to him to put forward a novel principle for which, up to the present time, there had been no English authority. He then cited the case of *Male* v. *Roberts* (2), in which the contract upon which the defendant was sued was made in Scotland, the defence being that the defendant was an infant, and where Lord Eldon held the defence bad, saying, "If the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given as evidence. The law of the country where the contract arose must govern the contract"; and after referring to the cases of *Scrimshire* v. *Scrimshire* (3) and *Simonin* v. *Mallac* (4) and other cases, he held that the marriage between the petitioner and respondent was valid, and dismissed the petition.

It appears to have been suggested that the papal dispensation of which the law of Portugal recognizes the validity could not be distinguished in principle from the consent of a parent; but Cotton L.J. stated in his judgment that it could not, in the opinion of the Court, be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage was effected. Mr. Foote's remarks upon this question in his book on Private International Jurisprudence, 3rd ed. p. 367, are much in point: "Dispensation with a law is, in principle, a very different thing from compliance with its directions, though in practice the effect of the two may sometimes be similar. In such a case as *Sottomayor* v. *De Barros* (5) the law of Portugal does not say that, when first cousins wish to intermarry, they shall obtain the written consent of the Pope to their doing so. It says they shall not marry at all, and such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with."

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(1) 5 P. D. at p. 100.
(2) (1799) 3 Esp. 163.
(3) 2 Hagg. Cons. 395.
(4) 2 Sw. & Tr. 67.
(5) 2 P. D. 81; 3 P. D. 1.

The last case in which the case of *Simonin* v. *Mallac* (1) has been referred to was the case of *Hay* v. *Northcote* (2), in which Farwell L.J. (then Farwell J.) followed that case.

In the United States of America the doctrine that the laws of the country or State where a marriage is celebrated will, in general, govern the question of its validity has been very clearly expressed. Several cases on the subject have been mentioned above, and in addition thereto and to the work of Story J., reference may be made to the cases of *Medway* v. *Needham* (3), which was commented on in *Brook* v. *Brook* (4); *Stevenson* v. *Gray* (5), *Commonwealth* v. *Graham* (6), and *Everett* v. *Morrison* (7); and to Mr. Bishop's Commentaries on the Law of Marriage and Divorce, ss. 353-370. In s. 359 the latter writer discusses the inconveniences which arise from applying a different rule, and after expressing the opinion that the decision of the Court of Appeal in *Sottomayor* v. *De Barros* (8) is contrary to the old ideas of the supremacy of English law on English soil, he states that: "No American Court has ever yet permitted any classes of foreigners, except Sovereigns and their diplomatic agents and attendants, to be thus exempt from subjection to our laws on American soil." He then proceeds to discuss (ss. 371-389) limitations to the doctrine, which are also referred to in Story J.'s work (ss. 89, 113A et seq.), but do not bear directly upon the question of minority. He also cites the case of the *Commonwealth* v. *Lane* (9), above referred to, and does not consider that the decision in *Brook* v. *Brook* (4) should be followed in America.

After very careful consideration of the present case we have come to the conclusion that the first point must be decided against the appellant, and that the marriage between her and Léon Philip must be declared valid in England.

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(1) 2 Sw. & Tr. 67.
(2) [1900] 2 Ch. 262.
(3) (1819) 16 Mass. 157.
(4) 9 H. L. C. 193.
(5) 17 B. Monr. (Ky.) 193, 210.
(6) (1892) 157 Mass. 73.
(7) (1893) 69 Hun. (N. Y.) 146.
(8) 2 P. D. 81; 3 P. D. 1.
(9) (1873) 113 Mass. 458.

That leaves for consideration the second question, as to the effect of the French decree. The argument upon this point for the appellant was that the decree had an effect similar to that of a decree of dissolution of marriage in a country in which both parties are domiciled, and that there was no distinction between the case of a decree of nullity and a decree of dissolution of marriage in its binding effect. Without doubt it has now been clearly established that the Courts of this country, wherever a marriage has been celebrated, recognize a decree of dissolution made by a proper tribunal of the country in which the parties are domiciled as universally binding and putting an end to the marriage, and it is no real exception to this principle that, in cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the Courts of the country of the domicil notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicil in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicil, or, as some have thought, that the wife must ex necessitate be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, and to require its Courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicil, and any domicil with which it were sought to fix him.

But there are differences between suits for dissolution of marriage, and those in which a declaration of nullity of marriage is claimed. The question raised in the latter class of suits is whether a valid marriage ever took place at all. Of course, if it took place, the domicil of the wife becomes the domicil of the husband. But, if it did not take place, the mere fact that a ceremony was gone through would not change the domicil of the wife, and she would not, therefore, necessarily have the same domicil as her intended husband. The Courts have recognized the distinction in several cases. In the case of *Sinclair* v.

Sinclair (1) there was a suit for divorce a mensa et thoro brought by the wife against the husband by reason of cruelty and adultery, by which he appeared under protest, alleging in bar of the proceedings that the suit could not be entertained by the Court, for that the marriage had been celebrated at Paris, and had been since dissolved by a sentence of the Court at Brussels on proceedings instituted by him, for nullity and divorce by reason of the adultery of the wife. It was clear that the Brussels decree was only on the ground of nullity. Lord Stowell, in giving judgment, said: "Something has been said on the doctrine of law respecting the regard due to foreign judgments, and undoubtedly a sentence of separation in a proper Court for adultery would be entitled to credit and attention in this Court; but I think the conclusion is carried too far when it is said that a sentence of nullity of marriage is necessarily, and universally, binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England." His Lordship, therefore, declared the protest insufficient, and directed the respondent to appear absolutely and answer the general charges of the wife's suit. It seems clear, from this judgment, that Lord Stowell did not consider that a sentence of nullity in Brussels would have been conclusive.

Again, in the case of *Simonin* v. *Mallac* (2) the Court did not regard the French decree as binding upon them, and dismissed the petition for nullity.

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(1) 1 Hagg. Cons. 294.

(2) 2 Sw. & Tr. 67.

C. A.
1907

OGDEN
v.
OGDEN.

In the case of *Niboyet* v. *Niboyet* (1) the late Lord Esher, in his judgment, intimates that, in his opinion, the rule as to jurisdiction in divorce does not apply to suits for declaration of nullity of marriage; and the late Lord St. Helier, in *Roberts* v. *Brennan* (2), expressed his view, and decided the case upon that view, that residence, and not domicil, is the test of jurisdiction in nullity cases.

A further distinction is to be noticed between the two classes of suits, namely, that our Courts regard the Courts of the domicil as having in general exclusive jurisdiction in a case of divorce, though the Courts of this country will recognize the binding effect of a decree of divorce, obtained in a State where the husband was not domiciled, if the Courts of the country or the State of his domicil will recognize the validity of the decree: *Armitage* v. *Attorney-General* (3); but it has frequently been held that, although the Courts of the domicil of the parties might entertain the question of the validity of their marriage, yet that the Courts of the country in which the marriage was celebrated will also entertain a suit to determine the same question: see *Linke* v. *Van Aerde*. (4) It may possibly be that if a suit were brought for nullity on the ground of impotence, and the facts were established in favour of the petitioner, either in the Court of the domicil of the parties or in the Court of the country in which the marriage was celebrated, it might be reasonable to hold that such a decree ought to be treated as universally binding, but it does not at all follow, where the only matter in dispute is whether a marriage ought to be held valid in the country where it was celebrated, and its validity is challenged on the ground of want of compliance with the formalities required by the laws of another country, that the Courts of the former country are to be bound by a decision on the question of the validity of the marriage given in the other country, even though it be the country of the domicil of one of the parties.

It certainly would be somewhat startling if this Court, having come to the conclusion that the marriage in question between the appellant and Philip was valid in England, should yet hold that the French decision that it was not a valid marriage was binding upon it. The fact is that a conflict of law exists between the laws of the two countries, owing to the difference between the rules of law adopted, and, as we hold, reasonably adopted, in England, and the provisions of the French Code. This is an entirely different case from a case of an application to dissolve a marriage, which begins with proof that a marriage has been validly contracted and celebrated, and the question is whether or not, on account of matters arising subsequently to the marriage, it has been, or can be, validly dissolved by a particular Court.

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(1) 4 P. D. 1, at p. 19.

(2) [1902] P. 143.

(3) [1906] P. 135.

(4) 10 Times L. R. 426.

Moreover, in the present case it is obvious from the terms of the decree that all that the decree has purported to declare is that the marriage is null according to articles 148 and 170 of the French Civil Code, which amounts merely to a declaration that the marriage is null and void where French law can prevail.

In our opinion, therefore, the second point ought to be determined against the appellant. In arriving at these conclusions we are fully conscious of the hardship on the appellant, because the effect of them is to hold that, although Léon Philip is free himself from her in France, she still remains in England his legal wife, and therefore not the wife of the petitioner; but we must arrive at the decision of this case by applying general principles which ought to be considered in any case which may arise where a marriage has taken place in this country between an English subject domiciled in England and a foreigner domiciled abroad, and the right remedy to look forward to is a recognition by the agreement of civilized countries of the principle that the omission of formalities required by the law of one country, but not by the law of the country where a marriage is celebrated, ought not to be allowed to affect the validity of the marriage in the country requiring such formalities.

It was stated that some changes have recently (1) been made in

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(1) [In 1907. There are alterations in the formalities of publication and the requirements as to consent. The matrimonial age of majority is made uniform (21) for both sexes. The "acte respectueux" is no longer required from a person more than 30 years old. An account of the new group of laws affecting marriage, by Mr. George Barclay, *licencié en*

French law, but the exact nature and extent of the changes did not appear. The observations made in this judgment are directed to questions arising in connection with the formalities required on entering into a marriage, and are not to be understood as necessarily advocating an interference with any views which may be held in any country as to marriages which are absolutely prohibited by the law of that country.

With regard to the decision dismissing the appellant's suit for a divorce, it may be observed that her position after the French decree and after Philip had left her and married again would be intolerable unless some remedy in her favour existed, for by reason of the conflict of laws she would be a wife in England and not a wife in France, and in regard to such an observation it may not unreasonably be suggested that the remedy may be to allow her to obtain a divorce in England. She was not allowed to do so, because it was held that the Court had no jurisdiction in such a case, as Philip was not domiciled in England, but the real basis for not allowing a divorce suit to be maintained except in the country where the married couple are domiciled is that, in order to prevent difficulties, inconveniences, and scandals which may arise from different decisions in different countries, "it is both just and reasonable" (in divorce cases) "that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws": per Lord Penzance, *Wilson* v. *Wilson*. (1) This, of course, assumes the existence of a marriage the validity of which is recognized in the country where the suit is brought, and that both persons are domiciled there. Now, if the country of the husband's domicil refuse to recognize the marriage, and therefore cannot and will not entertain a suit for divorce against him, the justice and reasonableness of the international rule just mentioned cease to be apparent, and the wife having no right of suit whatever against the husband in his country, and having been left in the

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droit, is forthcoming in the Journal of the Society of Comparative Legislation.—F. P.]

(1) 1872) L. R. 2 P. & M. 435, at p. 442.

followed
(1913) P 46, P 154

country of her original domicil where the marriage was celebrated and is recognized as binding upon both her and him, it would seem reasonable to permit her to sue in the latter country for the dissolution of the tie which is recognized therein, though not in the foreign country, in case she has grounds of suit which would entitle her to a divorce if her husband had been domiciled in her country; in other words, to treat her as having a domicil in her own country which would be sufficient to support a suit. No general rule of law would then really be infringed. The necessities of the case would call for the intervention of the Courts of her own country in order to do her justice and release her from a tie recognized in the one country though not in the other. This way of regarding the matter does not seem to have been presented on behalf of the appellant to Lord St. Helier. From the shorthand notes of the trial before him there appears to have been a very short discussion, and it seems to have been treated as if, the domicil of Philip being French, no claim for a divorce in a suit in this country was possible.

It is not necessary to come to a final conclusion on this important point, which was not discussed before us, for it would not help the appellant in the present case, as her suit for divorce was dismissed without any appeal being brought from the decision, and as she has subsequently gone through the ceremony of marriage with Mr. Ogden without having been released in this country from her previous tie.

In our judgment, therefore, this appeal must be dismissed, but in the circumstances without costs.

Appeal dismissed.

Solicitors: *F. Evelyn Jones ; Chester, Broome & Griffiths, for Crofton, Craven & Worthington, Manchester.*

W. C. D.

1907
Nov. 5, 6;
Dec. 3.

[DIVISIONAL COURT.]

THE EUROPA.

Ship—Contract of Affreightment—Damage to Goods—Unseaworthiness.

A shipowner, whose ship is unseaworthy at the commencement of the chartered voyage, though liable in damages to the charterer, the owner of the cargo on board, for injury to the cargo caused directly by that unseaworthiness, is not liable for injury caused to other portions of the cargo, not as the result of that unseaworthiness, but by a peril of the sea excepted in the contract of affreightment; that is to say, if unseaworthiness in the carrying ship is relied on by the cargo owner, he must prove that it was the cause of the damage.

Joseph Thorley, Ld. v. *Orchis Steamship Co., Ld.*, [1907] 1 K. B. 660, distinguished.

Appeal by defendants, the owners of the German steamship *Europa*, against a decree of the judge of the Liverpool County Court, made in an action in which the respondents, Tolme, Runge & Co., of London, charterers of the *Europa*, were plaintiffs, whereby judgment for 95*l.* was entered for the respondents with costs, for damage sustained by the respondents by reason of certain bags of sugar forming part of a cargo carried in the 'tween decks and lower hold of the *Europa* from Stettin to Liverpool having been delivered at Liverpool in a damaged condition.

The case raised the question whether seaworthiness is a condition precedent in a contract of affreightment, to the extent that, if the ship be unseaworthy, the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo to which the contract relates, even if such damage be solely caused by an excepted peril and not by the unseaworthiness.

By their statement of claim the plaintiffs alleged that "by a charterparty made between the parties, dated March 2, 1906, it was agreed that the defendants' steamship *Europa*, being in every way fitted for the voyage, should load at Stettin a full and complete cargo of sugar in bags, and being so loaded should proceed to Liverpool, and there deliver the same on being paid freight as therein provided. 2. The said steamship in pursuance of the said charterparty loaded a full and complete cargo of sugar in bags at Stettin, and proceeded thence to Liverpool. The whole of the said cargo at all material times was the property of the plaintiffs. 3. Part of the said goods was delivered in a damaged condition. 4. The said damage was due to the said steamship not being in every way fitted for the voyage. The said steamship was not seaworthy or fit for the carriage of the said goods."

By their particulars the plaintiffs said that "a closet pipe on the port side of the said steamship forward was defective, whereby water escaped and damaged the said goods. It was defective in that it had cracks through which water had escaped. It was also defective in that it had not been fitted with an expansion joint. Four old scupper holes in the 'tween deck waterways, from which the pipes to the bilges had been detached, were not properly closed, whereby water escaped through them into the lower hold and damaged the said goods," and the plaintiffs claimed 103*l.* 6*s.* 6*d.*, made up of 90*l.* 2*s.* 2*d.*, the difference between the sound value of 400 bags of sugar and the amount realized, together with charges.

By their defence the defendants, as to paragraph 4 of the claim, alleged that the ship was seaworthy and reasonably fit to carry the sugar to its destination at the time when she sailed, and they denied the particulars of unseaworthiness, and, in the alternative, pleaded that, "if there was any damage as alleged, which is not admitted, the same was caused by perils matters and casualties excepted by the said charter-party under which the said goods were shipped and carried." By their particulars as to the perils, matters and casualties relied on as excepted by the charterparty the defendants set out the following: "Perils of the sea, collisions, and accidents of navigation or latent defect in or accident to hull $\frac{\text{and}}{\text{or}}$ machinery even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other persons employed by the shipowner or for whose acts he is responsible." By further particulars the defendants said that, "By means of the steamship *Europa* coming into contact with the dock wall on April 3, 1906, the closet pipe referred to (in the plaintiffs' particulars) was cracked, and caused the damage (if any) complained of."

The facts proved at the trial and the decision of the learned county court judge sufficiently appear from the following extract from the judgment of the Divisional Court:—

"The defendants' steamship, the *Europa*, was chartered by the plaintiffs to carry a cargo of sugar, in bags, from Stettin to Liverpool and there deliver it—one of the excepted perils mentioned in the charterparty being 'collision.' When entering the dock at Liverpool the port bow of the steamship struck the dock wall, the blow breaking a water-closet pipe, so that water got through it into the 'tween decks, and some bags of sugar which were stored there were damaged by the water. In the 'tween decks were two scupper holes, near the water-closet pipe which had been so broken. The pipes which had originally been affixed to, and led from, these two scupper holes for the purpose of carrying off water from the 'tween decks to the bilges had been removed, and the scupper holes had been imperfectly plugged, with the result that the water from the broken closet pipe got through the scupper holes, and passed direct into the bags of sugar stored in the lower hold and damaged several of them. It was not disputed that this imperfect plugging existed before the cargo was loaded, and before the vessel started from Stettin, and that thereby the vessel was, to that extent, unseaworthy, and that the damage caused to the bags of sugar in the lower hold was caused through that unseaworthiness. The defendants, the owners of the *Europa*, did not dispute their liability for the damage to the bags of sugar in the lower hold, admitting that it was caused directly by the unseaworthiness; but they disputed their liability for the damage caused to the bags of sugar in the 'tween decks, on the ground that such damage was not caused at all by the unseaworthiness, but was the direct result of the collision with the dock wall, which collision was an exception in the bill of lading.

"The learned county court judge decided, on the authority of the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (1), that as in the charterparty there was a warranty of seaworthiness which had been broken, there had been a non-performance of a condition precedent to the right of the shipowner to sue, displacing the express contract, and that it was immaterial to consider what amount of damage was done to the cargo in the 'tween decks through the collision with the dock wall, and what amount of damage was done in the lower hold through the imperfectly plugged scupper holes, and he gave judgment for the plaintiffs for 95*l.*, which represented the damage in the 'tween decks and also in the lower hold."

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(1) [1907] 1 K. B. 660.

1907. Nov. 5, 6. *Bailhache* and *R. Wright*, for the appellants (defendants), owners of the *Europa*. The decision in the Court below was, in effect, that the warranty of seaworthiness having been broken, there had been a non-performance of a condition precedent which displaced the express contract, and therefore the owners of the *Europa* could not rely on the exception in respect of "collision," and were liable for all the damage both in the 'tween decks and in the lower hold.

In support of this finding the learned county court judge relied on a passage in the judgment of Collins M.R., when dealing with a question of deviation, in the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (1), viz., that the principle underlying previous decisions is "that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit"; but this statement cannot be taken to mean that the undertaking that the vessel shall be seaworthy, and the undertaking that the vessel shall not deviate, are equally conditions precedent, so that the breach of either of them has the same effect in absolutely putting an end to the right of the shipowner to set up the contract, for though it may be that deviation displaces the original contract independently of any question whether the deviation had any bearing on the particular loss complained of by the cargo-owner, and it may also be correct to say that a policy of insurance is vitiated by deviation on the ground

(1) [1907] 1 K. B. 660, at p. 667.

given by Lord Mansfield in *Lavabre* v. *Wilson* (1), that a different voyage has been substituted for that contemplated in the policy; and, further, it may be argued that in the case of unseaworthiness the risk covered by the policy never attaches, that is to say, in the case of a voyage policy, the seaworthiness of the vessel at starting is an absolute condition precedent, and a breach deprives the assured of any recourse against the insurer, so that it is immaterial whether the loss can be traced to the unseaworthiness or not; but that doctrine has never been applied to the contract of affreightment so as to render proof of unseaworthiness in the carrying vessel sufficient, by itself, to support a claim for damage to cargo. In other words, a breach of the implied undertaking of the shipowner that his vessel is seaworthy renders him liable for loss caused by unseaworthiness, unless he has expressly protected himself by contracting not to undertake responsibility for loss so occasioned; but he is not liable for loss not caused by unseaworthiness, but due to causes which come within the excepted perils—that is to say, unseaworthiness does not sweep away all the exceptions in the contract of affreightment, for the shipowner is only responsible if the loss would not have arisen but for the unseaworthiness: see Carver on Carriage by Sea (1905), ss. 17 and 102A.

In *Kopitoff* v. *Wilson* (2) the second question put to the jury was, "If the vessel was not in a fit state, was the loss that happened caused by that unfitness?" And in *Steel* v. *State Line Steamship Co.* (3) Lord Blackburn says: "For some reason or other, I cannot exactly make out what, the Court below lost sight of the fact that if there was a want of seaworthiness in the ship . . . . and that want of seaworthiness caused the loss, this contract did not protect the shipowners, and therefore it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss." So Butt J. in *The Glenfruin* (4), after commenting on these two cases, and referring to the exceptions relied on, says that the dangers and accidents excepted must happen to a seaworthy vessel, "and that the exception has no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage"; and in *Gilroy* v. *Price* (1) it was held that an exception of "negligence" did not relieve the shipowner from his obligation to supply a ship that was seaworthy, and therefore he was liable for a loss caused by unseaworthiness, although that might have been due to negligence of the master and crew. Hence, in the present case, the shipowner admits liability for the damage done to the sugar in the lower hold through unseaworthiness, but rightly denies that he is liable for the damage done to the sugar in the 'tween decks, as that was due to an excepted peril, namely, "collision." It is submitted, therefore, that the amount of the damage must be re-assessed by the county court judge.

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(1) (1779) 1 Doug. 4th ed. 284, at p. 291.

(2) (1876) 1 Q. B. D. 377, at p. 379.

(3) (1877) 3 App. Cas. 72, at p. 89.

(4) (1885) 10 P. D. 103, at p. 108.

[The case of *The Pentland* (2) and Scrutton on Charterparties and Bills of Lading, 5th ed. (1904), art. 29, were referred to.]

Horridge, K.C., and *Greer*, for the respondents (plaintiffs), Tolme, Runge & Co., charterers of the *Europa*. A responsibility is cast upon the shipowner to furnish a ship fit to carry the cargo the charterer has undertaken to put on board, and if the ship is not fit the charterer may refuse to load: *Stanton* v. *Richardson* (3); the reason being that in every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy: *Kopitoff* v. *Wilson.* (4) Hence Lord Cairns L.C. lays down that the excepted matter in the bill of lading (then under consideration), "in respect of which there is to be no liability on the part of the shipowner," is "matter subsequent to the sailing of the ship with the goods on board," the question whether the vessel was seaworthy when she left being a question of fact "which lies at the very root of this case": *Steel* v. *State Line Steamship Co.* (5); and this is the basis of the decision of Butt J. in *The Glenfruin.* (6)

(1) [1893] A. C. 56.

(2) (1897) 13 Times L. R. 430.

(3) (1872) L. R. 7 C. P. 421; (1874) 9 C. P. 390.

(4) 1 Q. B. D. 377.

(5) 3 App. Cas. 72, at pp. 78, 81.

(6) 10 P. D. 103, at p. 108.

It may be that these cases do not distinctly raise the point that, as between the parties to the contract of affreightment, that contract disappears in respect of the whole or the portion of the cargo to which the contract relates, and the shipowner cannot rely on exceptions, which would otherwise protect him, if his ship is unseaworthy at the material time; but in *Balian* v. *Joly, Victoria & Co.* (1) the Court of Appeal in effect held that the shipowner loses the benefit of the exception clause if there has been any deviation in the voyage. This case was followed by Channell J. in *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (2), and the decision of that learned judge was affirmed on appeal (3), the point made, viz., that the defendants having, by reason of the deviation, failed to perform the bill of lading contract, were not entitled to set up by way of defence the exception clause therein contained, being explained by Collins M.R., and, in addition to the passage already referred to by the appellants (4), the learned judge dealt with the underlying principle as follows (5): "I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases. If such a term of the contract is an absolute condition, failure to comply with which displaces the contract of insurance, it appears to me that it must be a condition in the same sense in the case of the contract of affreightment, and failure to comply with it ought in principle to produce the same results, which is the case if its effect is to displace the special contract." The learned county court judge was, therefore, justified in holding, on the authority of the above dicta of the then Master of the Rolls, that "the fact that the *Europa* was unseaworthy in one particular means the failure to comply with the condition precedent and displaces the express contract. It is, therefore, immaterial to consider what amount of damage was in each hold."

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(1) (1890) 6 Times L. R. 345.

(2) [1907] 1 K. B. 243.

(3) [1907] 1 K. B. 660.

(4) Ibid. at p. 667.

(5) Ibid. at p. 668.

[The following text books were also referred to: Arnould on Marine Insurance (1901), ss. 688, 689; Carver on Carriage by Sea, 4th ed. (1905), s. 287, citing Tindal C.J. in *Davis* v. *Garrett*. (1)]

Bailhache, in reply. The only ground for the contention of the respondents is that, when dealing with a case, not of unseaworthiness, but of deviation, in *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (2), Collins M.R. said that deviation has the same effect on the contract of affreightment that unseaworthiness has on the contract of insurance.

Cur. adv. vult.

Dec. 3. The judgment of the Divisional Court (Bucknill and Bargrave Deane JJ.) was delivered by

BUCKNILL J. The question raised on this appeal is a very important one, and we think the exact point has not yet been decided.

It is whether a shipowner, whose ship was unseaworthy at the commencement of the chartered voyage, is liable in damages to the charterer, the owner of the cargo on board, not only for injury to his cargo, caused directly as the result of that unseaworthiness, but also for injury caused to other portions of the cargo, not as the result of such unseaworthiness, but by a peril of the sea excepted in the bill of lading; in other words, whether seaworthiness is a condition precedent in a charter of affreightment, to the extent that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo, even if such damage be solely caused by an excepted peril and not by the unseaworthiness.

The county court judge, from whose decision this appeal comes, held that he was, and gave judgment against the shipowner for all the damage occasioned to the cargo, on the authority of *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (2) We will state the facts of this case (*The Europa*) more particularly hereafter. It is contended by the appellants that *The Orchis* (2) did not decide the question, although it must be admitted that the language of the then Master of the Rolls, now Lord Collins, is capable of being read as amounting to a direct opinion that in such a case the shipowner would be liable, although, but for such unseaworthiness, the exceptions in the charterparty would have protected him. The point for decision in the case of *The Orchis* (1) was as to the liability of the shipowner to the cargo-owner where there had been a deviation from the original voyage and damage to cargo during its discharge by the negligence of the ship's stevedore, which negligence was an exception in the bill of lading. The sentence in Lord Collins' judgment on which the respondents rely is as follows. (2) Referring to the judgments delivered in the Court of Appeal in *Balian* v. *Joly, Victoria & Co.* (3), Lord Collins said: "The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit." He continued, and apparently in the same line of thought (4): "I would only add that I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases."

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(1) (1830) 6 Bing. 716.

(2) [1907] 1 K. B. 660.

All the members of the Court of Appeal in the case of *The Orchis* (1) considered that the decision in *Balian* v. *Joly, Victoria & Co.* (3) governed the principle on which they gave their judgment, and that it was impossible to distinguish that case from the case which they were deciding so as to render the reasoning upon which the earlier decision was founded inapplicable to the later one; but both were deviation cases, and the exact point decided in *The Orchis* (1) was that, as between the shipowner and cargo-owner, the deviation displaced the bill of

(1) [1907] 1 K. B. 660.

(2) Ibid. at p. 667.

(3) 6 Times L. R. 345.

(4) [1907] 1 K. B. at p. 668.

lading contract altogether, so that it must now be taken that where there has been a deviation, it amounts to a non-performance by the shipowner of a condition precedent, the result of which is that it displaces the original contract, whether the deviation had any relation to the loss sustained by the cargo-owner or not.

We have to decide whether "seaworthiness" is to be classed with non-deviation as a condition precedent, the non-performance of which voids the contract of affreightment, so that in the case of the *Europa*, she being unseaworthy, even though she had carried all the cargo specified in the bill of lading to the proper destination, yet could not claim exemption from liability for damage caused, not by the unseaworthiness, but by a peril of the seas or other exception in the bill of lading.

Except so far as appears in the judgment of the Court of Appeal in *The Orchis* (1), we have not found any case where such a proposition has been enunciated, if it was, which we doubt. As between shipowner and charterer it may be that representations or promises made by the one or the other, or by both, may amount to warranties and be also conditions precedent which may give to that one who is not in default a right to treat the representation or promise of the other as a condition precedent, and to refuse to be bound to the performance of his own part of the contract. For example, if a shipowner enters into a charterparty with a merchant to go to a specified port or place and there to load a cargo, and when the ship arrives the charterer finds that the ship is not seaworthy, he may, if he be so minded, refuse to put his goods on board on the ground that the shipowner has not provided a seaworthy ship, and the shipowner could not oblige him to, because he himself had not performed on his part the condition which was precedent to his being able to oblige the charterer to load. But if the cargo was loaded and carried to its destination, even although it was damaged through the unseaworthiness, the remedy in the hands of the charterer is, in our judgment, to sue the shipowner for those damages, in answer to which he could not avail himself of the charterparty or bill of lading which, had his ship been seaworthy, would have been a protection to him. To that extent they would be useless to him.

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(1) [1907] 1 K. B. 660.

In our opinion there must be a time when the charterer or cargo-owner has no longer a right to treat the promise or warranty of the shipowner as a condition precedent, but must rely on his breach of warranty, and must then prove that the damage sued for has been caused by the unseaworthiness of the ship at the material time.

In *Boone* v. *Eyre* (1) Lord Mansfield said: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." That was an action by the plaintiff, who had covenanted to convey to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l*. and an annuity of 160*l*. for his life. The plaintiff covenanted that he had a good title to the plantation and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. Demurrer. Lord Mansfield, after laying down the law as above, added: "If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." Judgment for plaintiff on the demurrer. In *Hotham* v. *East India Co.* (2) Ashhurst J., delivering the judgment of the Court, said: "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent. . . . . The merits, therefore, of the question must depend on the nature of the contract and the acts to be performed by the contracting parties." In

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(1) (1777) 1 H. Bl. 273, note.

(2) (1787) 1 T. R. 638, at p. 645.

Ritchie v. *Atkinson* (1) it was laid down that the cases where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other have been where it appeared, upon the face of the contract, to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other.

Having cited these cases to indicate the nature of a condition precedent according to the terms of the contract, we will now state the facts in this case. [The learned judge dealt with the facts already set out, and continued :—]

It will be observed that on these facts the learned county court judge decided that the obligation to provide a seaworthy ship continued to be a condition precedent on the part of the shipowner, and that, by his failure to perform it, the excepted peril in the charterparty by collision was no longer a protection to him for that damage which was in no way connected with the ship's unseaworthiness, because he held the contract to have been entirely displaced. If this case was one of deviation we should consider we were bound by the case of *The Orchis* (2), or, if it had been a question between assured and underwriter, there would have been no doubt that, by the unseaworthiness of the ship, the insurer would not have been liable, because the warranty of seaworthiness at the material time having been broken, the contract would thereby have ceased to exist; but is it true to say that the same considerations apply in this case?

We have not found any authority for such a proposition, unless the case of *The Orchis* (2) is one. In Carver on Shipping, 4th ed. (1905), s. 17, it is put thus: "The shipowner remains responsible for loss or damage to goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness"; and at s. 102A: "An exception of 'negligence' does not relieve the shipowner from his obligation to supply a ship that is seaworthy and fit for the cargo, at the commencement of the voyage. He is liable for a loss caused by unseaworthiness, or unfitness, although that may have been due to the negligence of the master and crew, unless there was an express exception relieving him from that unseaworthiness or want of fitness." In Parsons on Shipping (1869), vol. 1, p. 320, we find this statement: "If the owner promises that his ship shall be staunch and tight, and he carries the cargo, but the ship is neither staunch nor tight, this is not a separable promise in the sense in which a promise to carry a full cargo is, for a ship must be seaworthy, or not seaworthy, as a whole; but it is so far separable, that the effect of the breach of it does not necessarily extend to the whole cargo, and therefore may not to the compensation for carrying it." For the above opinion Mr. Parsons quotes *Havelock* v. *Geddes*. (1) In that case the shipowner had covenanted with the charterer that he would forthwith make his ship tight and strong for a voyage of twelve months, and keep her so. Lord Ellenborough, in giving judgment, said: "And to be sure, if this were a condition precedent the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition, and a defence to the whole of the plaintiff's demand." In *Steel* v. *State Line Steamship Co.* (2) Lord Blackburn said: "So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it." *The Glenfruin* (3) was cited during the arguments before us. There the defendants, the owners of cargo, were sought to be made liable for salvage services rendered to the *Glenfruin*, on which the defendants' cargo was being carried, the owners of the salving ship being also the owners of the salved ship. The salvage services were rendered because the *Glenfruin's* shaft broke during the voyage. The defence was that the *Glenfruin* was unseaworthy at the time when she began her voyage, and that the bill of lading given for the defendants' cargo, which excepted accidents from machinery

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(1) (1808) 10 East, 295, at p. 310.

(2) [1907] 1 K. B. 660.

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(1) (1809) 10 East, 555, at p. 563.

(2) 3 App. Cas. 72, at p. 88.

(3) 10 P. D. 103, at p. 108.

—her shaft broke at sea in fine weather—was, therefore, not binding on them, and that the plaintiffs, as owners of the salving and salved ships, were liable to the defendants for all damages and losses occasioned by the unseaworthiness of their ship, the *Glenfruin*, of which losses salvage was one. Butt J. said: "I am of opinion that the exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft," and a little lower down on the same page he said that the exception in the bill of lading had no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. *Kopitoff* v. *Wilson* (1) was an action by an owner of goods shipped on board the defendant's ship and which were lost whilst on a voyage from Hull to Cronstadt. The declaration alleged a breach of warranty of seaworthiness of the ship by the defendant, and that the goods were lost by reason of the breach, but it was not argued or suggested that if the goods had not been lost in consequence of the unseaworthiness the defendant would still have been liable, or that the bill of lading would not have applied. The two questions which were left by Blackburn J. to the jury were, first, whether the ship was seaworthy, and, secondly, whether, if she was not seaworthy, the goods were lost by her unseaworthiness. *Gilroy* v. *Price* (2) was a decision on a question of fact, whether the respondents' ship was unseaworthy on sailing, and whether, if so, the bill of lading relieved them notwithstanding as to the goods which were damaged in consequence of such unseaworthiness; and it was held that, the ship being unseaworthy, the respondents lost the protection of the bill of lading as to the damage so caused.

It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.

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(1) 1 Q. B. D. 377.

(2) [1893] A. C. 56.

We now come to the most anxious part of our judgment, and that is, whether Lord Collins did say in *The Orchis* (1) that the same considerations must apply in the case of a warranty of seaworthiness in a charterparty between shipowner and charterer, as in the case of a policy of insurance on ship or goods, where such a warranty is made expressly or by implication. The conclusion to which we have come is that he neither said it, nor does it appear to us that he meant to say it. Reading his judgment as a whole, we think he had in his mind the analogy between a deviation and the warranty of seaworthiness in a policy of insurance, and that it so appears from what he said at p. 668 of the report in the *Law Reports*, and must be taken to refer back to what he said at p. 667, which we have already quoted. He was speaking of two classes of cases only, and not of three, and to our minds this is clear. The present Master of the Rolls, then Cozens-Hardy L.J., in his judgment said nothing about the case of a warranty of seaworthiness in the case of the chartering of a ship; neither did Fletcher Moulton L.J. They confined themselves to the case of a deviation and its consequences between the shipowner and the holder of the bill of lading.

For these reasons we are of opinion that *The Orchis* (1) is not a case that can properly be relied on as an authority justifying the judgment of the county court judge from whose decision this appeal comes, and in our judgment the plaintiffs are only entitled to recover from the defendants such damages as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charterparty, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel. As the damages have not been ascertained on this basis the matter must be sent back to the county court judge to assess them.

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(1) [1907] 1 K. B. 660.

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Appeal allowed with costs.

Solicitors for appellants (defendants): *Holman, Birdwood & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for respondents (plaintiffs): *Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

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Nov. 18; *Dec.* 2.

Divorce—Practice—Alimentary Provision for Wife—Restitution of Conjugal Rights — Decree — Non-compliance — Matrimonial Causes Act, 1884 (47 & 48 *Vict.* c. 68), *ss.* 2, 4—*Rights of Wife—Election—Suit for Judicial Separation—Decree therein—Waiver of alimentary Remedy under Act of* 1884—"*Alimony,*" *What is—Wife's need of Support—Discretion of Court as to directing Inquiry with regard to or ordering or withholding Alimony—All the Circumstances to be considered in each Case—Refusal of Order.*

A wife, who has obtained a decree for restitution of conjugal rights, may, if the husband disobeys that decree, either apply for an alimentary provision and to have the same secured to her under the Matrimonial Causes Act, 1884, or, if she elects to petition for a judicial separation, she may apply for alimony, and, after she has obtained a decree, may ask for permanent alimony to be allotted to her; but it is not open to her, after she has elected to proceed for a judicial separation and after she has obtained a decree in that suit, to ask for an order and for security under the Act of 1884.

The question what is alimony and the practice which still guides the Court in dealing with applications for alimony are the same as were laid down in, and which guided the old Ecclesiastical Courts in considering, applications for alimony.

All the circumstances are to be considered in dealing with each particular case.

If the Court should find that the circumstances are such as shew that the wife does not require any order for alimony for her personal support in her normal position, it may refuse to direct the registrar to proceed with an expensive and harassing inquiry, or to make any order for alimony.

Kelly v. *Kelly*, (1863) 32 L. J. (P. & M.) 181, not followed.

THIS was a summons adjourned into Court for argument on appeal from the registrar, who had decided, in the circumstances, to make no order on the wife's application for an allowance.

In 1906 the wife petitioned for restitution of conjugal rights, and, pending the hearing of that suit, obtained an order for alimony at the rate of 330*l.* a year.

On February 4, 1907, a decree was pronounced, and, this not having been complied with, the wife on March 5, 1907, presented a petition for judicial separation on the ground of the statutory desertion.

In this suit, upon a petition for alimony pendente lite being presented, it was by consent adjourned, the respondent undertaking to continue to make payments to the petitioner at the same rate as had been ordered in the former suit.

On June 10, 1907, a decree of judicial separation was pronounced.

On July 22, 1907, the petitioner was sentenced for fraud to a term of five years' penal servitude, which she was now undergoing.

The last payment for alimony was made by the husband on July 25, 1907.

In November, 1907, the wife's advisers obtained an appointment before the registrar to proceed with the question of alimony, and the pleadings and application were by consent treated as upon the basis of an application for a permanent allowance, though at the present hearing there appeared to be some dispute as to whether, when that consent was given, the permanent allowance, which was thus made the subject of inquiry, was intended to be a permanent allowance based on the decree for restitution, or permanent alimony based upon the decree for judicial separation.

The registrar, after hearing arguments, decided to make no order, having regard to the position of the petitioner as an inmate of one of His Majesty's prisons undergoing a long term of penal servitude.

From this decision the petitioner appealed to the judge in chambers, and the summons was adjourned into Court for argument.

Barnard, K.C., and *Lambert*, for the petitioner. The petitioner is entitled to have an allowance secured to her under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 2.

[BARGRAVE DEANE J. Is there power to vary an order made after a decree for restitution of conjugal rights?]

Sect. 4 gives the Court power to vary such an order. At any rate, there is subsisting an order for an allowance of 330*l.* a year made under the Act of 1884, and the petitioner is entitled to that allowance in any event. Although the petitioner has since obtained a decree for judicial separation, that has not put an end to the order for an allowance made in the suit for restitution, which, it is submitted, was continued by consent.

[*George Wallace*, for the respondent. No order was made after the restitution decree was pronounced, but the registrar intimated that the respondent ought to continue the payments at the same rate as theretofore, and those payments have accordingly been continued up to the time when the petitioner was convicted and went to prison.

BARGRAVE DEANE J. I am told that an order was made by the registrar, but that it was never drawn up.

George Wallace. The respondent never agreed to any permanent allowance of any kind.]

All that the petitioner asks is that an inquiry should be held by the registrar. The registrar will then decide in which suit and under which Act an order is to be made.

[BARGRAVE DEANE J. No; that is not so.]

If the Court makes no order, the petitioner is prevented from ever getting any allowance from her husband. It is not contended that the Court is bound to allot one-third, but the petitioner is entitled to have an allowance secured to her. The Court may, perhaps, say that the amount ought to be reduced during the time she remains in prison.

[BARGRAVE DEANE J. What is the meaning of the word "alimony"? Is it not a support for the wife in the sense of preventing her from starving and providing her with necessaries in the way of clothing? If so, this support is already provided for her by the prison authorities.]

If the petitioner has no immediate need of the amount to be allotted, she may desire to use it for the purpose of insuring the respondent's life, so as to have a provision in the future after he is dead. As to the present position of the petitioner, *Kelly* v.

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Kelly (1) is an authority that it is not to be taken into consideration. But, even supposing that the Court were to decide that this case ought not to be followed and were to hold that the petitioner is not entitled to an effective order whilst serving her sentence of penal servitude, an inquiry as to the husband's means ought to be directed, and an order ought to be made thereon, though it might, if thought proper, be temporarily suspended under s. 4 of the Act of 1884.

Montague Lush, K.C., and *George Wallace*, for the respondent. Even if the petitioner were entitled to an order under the Act of 1884, such an order can be made at any time after decree (see s. 2); but it should not be made now, being quite unnecessary, and the petitioner being, in fact, precluded from enjoying it if it were now made. If the registrar's refusal to make an order is confirmed by the Court, there is nothing to prevent the petitioner, when she comes out of prison, applying for such suitable allowance as she may be found to be then entitled to. The Court must look at the circumstances as at present existing. Although in the Act of 1884 the word employed by the Legislature is "allowance," the principles which govern the case are the same as those which govern applications for alimony. Sect. 2 of the Act of 1884 speaks of enforcing an order made under that Act in the same manner as orders for alimony are enforced, and s. 4 expressly gives the Court power to alter or temporarily suspend any order which has been made. Orders under the Act of 1884 ought clearly to be made only in cases where orders for alimony would be made. Then, what is "alimony"? In the course of the judgment of the Court of Appeal in the case of *In re Robinson* (2) Cotton L.J. said: "Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by order of the Court from time to time to provide for the maintenance of the wife."

There are many instances in which alimony has been or

(1) 32 L. J. (P. & M.) 181.

(2) (1884) 27 Ch. D. 160, at p. 164.

may be refused, owing to the conditions and circumstances being such as to render it unnecessary that the husband should be ordered to pay anything for the support of the wife. *George* v. *George* (1) is an example. In *Wilson* v. *Wilson* (2), Sir William Scott, in the course of his judgment, said: "If it should happen, as by the introduction of other principles and operation of law it often may, that the wife has an income correspondent to her own expenses and the necessary expenses of the suit (for both must appear), there is no longer the same reason that she should be a privileged suitor. It may turn out that, on the result of the proceedings, she may be still entitled to her costs; but, by a variety of cases—particularly the last of those mentioned—(3) . . . . it has been decided that where there is an independent income, competent to the support of the wife and the maintenance of the suit, the privilege is no longer considered to continue." In other words, if the necessity for holding an inquiry and making an order is shewn not to exist.

The truth is that the Court is not bound to award anything, and it cannot properly award anything unless the existing circumstances are shewn to be such as to render an award requisite for the support of the wife. In the case now before the Court the circumstances do not exist which render any award necessary or which make it incumbent on the Court to direct an inquiry as to means.

As to the form of the application, it is submitted that the petitioner cannot now apply in the restitution suit. Her rights, whatever they may be, must be those of a wife who has obtained a decree of judicial separation and is applying for permanent alimony.

Barnard, *K.C.*, in reply. *George* v. *George* (1) was an application for alimony pendente lite; the husband and wife had been living apart for several years, and the wife was in service and receiving wages. The Court held that, in those circumstances, to award alimony pending suit would have the effect of putting the wife into a better position than she was in before the

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(1) (1867) L. R. 1 P. & M. 554 (see also *Burrows* v. *Burrows*, ibid.).

(2) (1797) 2 Hagg. Cons. 203, at p. 204.

(3) 2 Hagg. Cons. at p. 204, n.

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suit was commenced. *Wilson* v. *Wilson* (1) is no authority whatever.

Cur. adv. vult.

1907. Dec. 2. BARGRAVE DEANE J. In this case an appeal was brought before me in chambers from a refusal of the registrar to entertain a petition for permanent alimony in a suit for judicial separation, on the ground that the petitioner was in prison under a sentence of five years' penal servitude. I thought it was a case of sufficient importance to adjourn it into Court, so that the matter should be discussed in public, and not privately in chambers, and so that, if necessary, it might be reported.

The facts, shortly stated, are these: Mrs. Leslie presented a petition to this Court for restitution of conjugal rights, and on February 4, 1907, she obtained a decree. Pending that suit she presented a petition for alimony under the Matrimonial Causes Act, 1884, and she obtained an order for an allowance of 330*l.* a year under that Act. On March 5, the husband not having obeyed that decree for restitution, she filed a petition for judicial separation on the ground that the husband had been guilty of statutory desertion under the Act of 1884, and she was thereupon entitled to a decree of judicial separation on the ground of such desertion.

On the following day, March 6, she filed a petition for alimony pendente lite, and the Court ordered, as I understand by consent, the same amount of alimony pendente lite as had been ordered in the restitution suit, namely, 330*l.* a year. She obtained her decree of judicial separation, the husband not defending it, on June 10, 1907. She did not file a further petition for alimony, but she came before the Court on a summons before the registrar, taking the old petition for alimony pendente lite in the judicial separation suit as a new petition for permanent alimony, and asking for an allotment of permanent alimony.

An order was made that both the parties should attend for cross-examination; but before that had been completed the wife had been convicted of a very serious fraud, and was sentenced, as

(1) 2 Hagg. Cons. 203, at p. 204.

I have said, to penal servitude for five years; and she is now serving that term of penal servitude. The registrar had some doubt as to what course to pursue, but on the whole he thought the best thing was for him to refuse to entertain the application any further so long as she was in prison. He accordingly made no order. Thereupon, as I have said, there was an appeal to me in chambers from the registrar, and I adjourned it into Court, and it was argued before me on November 18.

Mr. Barnard, who appeared for the wife, raised two points. He said in effect: "In any event there is subsisting a decree for an alimentary allowance, under the Act of 1884, of 330*l.* a year, and she is entitled to that in any event, because that remains; and, although she has obtained a decree of judicial separation, that decree has not put an end to the order for alimony or alimentary allowance in the restitution suit." Beyond that he said that, even if that is not so, the fact that she is in prison is no answer to her application for permanent alimony in the judicial separation suit.

First of all, with regard to the question whether the order for alimentary allowance under the Act of 1884 is still in existence and in force, I have a very strong opinion myself that it is not. I think that when once a woman has taken advantage of the Act of Parliament and has filed a petition for judicial separation, her petition puts an end to the position she originally held as a wife who is entitled to the benefit of an order for a secured allowance under the Act of 1884.

In my opinion the suit for separation on the ground of desertion brings her under the Divorce Acts and takes away her position as a petitioner under the Act of 1884. I say that is my strong opinion, and I find that as far back as 1889 this question was brought to the notice of the Court in a case of *Theobald* v. *Theobald*. (1) There Sir Charles Butt laid down fairly and clearly his view, although it was not, in the strict sense of the word, a decision on the point. This is the passage in the judgment: "It is argued that it cannot have been the intention of the Legislature that the wife should get more than if she had obtained a decree of judicial separation; but I am by no

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(1) (1889) 15 P. D. 26, at p. 28.

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means inclined to agree with that view of the matter. I think the wife is entitled to take one of two courses. She may, if she chooses, institute a suit for judicial separation, in which case she would get alimony, but it would be unsecured; or she may rest content with her decree for restitution of conjugal rights and apply to the Court for the periodical allowance contemplated by the Act and have that periodical allowance secured. I do not see anything unreasonable in giving her that option." That appears to raise this point, that she has her option; if she rests satisfied upon the decree of restitution, then she can have an allowance under the Act of 1884, and can have it secured; but if she exercises her option and goes further, and asks for a decree of judicial separation, then she must apply for an order of the Court for an allowance in that suit for judicial separation, as was, I gather, done here.

Therefore I think that Mr. Barnard's first point is not a sound one.

The petitioner was applying here for permanent alimony under the decree of judicial separation, and that is the only thing which she can ask for. The important point, of course, is that under an order for alimony, if she should obtain it, she could not have the allowance secured, as she could have done under the Act of 1884. But that is really only a subsidiary point. It is said that this woman is entitled to have an expensive inquiry, as against her husband and at his expense, with a view of the allotment of permanent alimony for her, although she is in prison and under a sentence which will continue for more than three years at the least. Anything may happen in those three years: she may die; the husband may die; or things may have altered in a way which may make his income absolutely different from what it is to-day.

Ought I, therefore, when this is the state of things, to put the husband to the present expense of an inquiry before the registrar for permanent alimony for her?

What is permanent alimony, and what are the principles upon which this Court will allot permanent alimony? We are aware, of course, that under the Divorce Act, in cases of judicial separation, the Court has to apply the principles which were formerly applied by the old Ecclesiastical Courts, whose rules of practice with regard to allowance for a wife were practically the same as those which have been adopted by this Court in divorce cases—that is to say, we look to the means of both parties; we look at the condition of both parties; we look at the surrounding circumstances; and we allot such a sum as we think, considering the conditions of the parties, considering their means, and in view of all the circumstances, should be paid by the husband to the wife and as will support her in the position of life in which she actually is. This woman is in penal servitude at the cost of the State; she is boarded by the State; she has no opportunities of spending money on amusements; in fact, I cannot conceive any matter upon which it should be necessary that she should have what is called "alimony" allotted to her as long as she is in prison.

It is said that this question has been decided in her favour in a case of *Kelly* v. *Kelly*. (1) That is an old case in which a wife had been sentenced to six months' imprisonment. We are not told by the report how long she had been in prison when the application was made to the Court. The Court in that case did not lay down any general principle; but in that particular case the Court said that there was no reason why it should not proceed to allot alimony, which, of course, would be available as soon as she came out of prison. If I were to make the order that this inquiry should take place now, and if an order were to be made thereon, is it to be said that the money so ordered is to be accruing in favour of this wife for over three years, so that it will be a lump sum when she comes out, in the hands of her solicitor, I suppose, for her benefit? That is not the idea of alimony as practised in this Court, or in the old Ecclesiastical Courts. In my opinion, so long as the petitioner remains in prison, no alimony ought to be paid by the husband for her support, her maintenance, her clothing, or the education of the children, if there were any—but there are no children here—and so on.

Therefore, in my view, the registrar is right, and this is not a time at which the Court should be asked to put the husband to this expense in favour of a woman for whom alimony is not at

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(1) 32 L. J. (P. & M.) 181.

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the present moment necessary. I see that a time may come when it will be necessary that this inquiry should be held; and I think the best order I can make now is that the application for permanent alimony should stand over until, say, two months before the time comes when the petitioner will be released from prison. An inquiry can then be held, and an order can be made to take effect from the time when she comes out of prison. The consequence is I dismiss the appeal.

After some further arguments the question of costs, both before the registrar and before the judge, was reserved.

Leave to appeal, if necessary, was granted.

Solicitors for petitioner: *Colyer & Colyer.*

Solicitors for respondent: *E. F. Turner & Sons.*

H. D. G.

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IN THE ESTATE OF LEVY, DECEASED.

Practice—Administration—Intestacy—Limited Foreign Grant—Assets in England—Full Grant under s. 73 to Foreign Administrator.

In a case where the Court of the domicil of a deceased person, part of whose assets consisted of personal estate in England, had made a grant of administration limited in time, this Court made, under s. 73 of the Probate Act, 1857, a general grant to the foreign administrator.

MOTION FOR ADMINISTRATION.

Emile Benoist Levy, late of the Rue de Rivoli, Paris, died there on April 11, 1907.

The deceased was domiciled in France, and left no will.

His widow and four children survived him. All the children were under twenty-one years of age.

The deceased was engaged in business as a banker, and the French Court, after his death, appointed its judicial administrator, Georges Emile Lemarquis, administrator for a period of six months, commencing July 20, 1907.

Part of the deceased's personal estate consisted of shares in public companies in England.

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The French administrator desired a grant here, to enable him to collect the assets in England.

A renunciation by the widow, purporting to be on behalf of herself and her children, was filed.

Bayford moved for a limited grant to the foreign administrator. It is submitted that this Court should as far as possible follow the form of the foreign grant. There is no reported case in which a full grant has been made here, after a limited foreign grant has been made by the Court of the domicil of the deceased person. During the Long Vacation in 1902 one of the registrars made a limited grant here, following a limited foreign grant.

BARGRAVE DEANE J. I was inclined to limit the grant in this case for so long as the applicant continues to represent the estate of the deceased in France; but I am told by the Court registrar that I had better make a general grant under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77), and I therefore adopt this form, and order accordingly.

Solicitors: *Denton, Hall & Burgin.*

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[IN THE COURT OF APPEAL.]

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Admiralty—"Risk of Collision"—Regulations for Preventing Collisions at Sea, 1897, *Preliminary Article to Steering and Sailing Rules, and art.* 29.

A steamship going down the river Elbe, and seeing the three lights of a steam-tug ahead or a little on her port bow, ported to give more room, thereby bringing herself well over to her proper starboard side of the channel; but the tug starboarded and got on to the starboard bow, whereupon the steamship slightly starboarded and steadied, bringing the vessels green to green at half to three-quarters of a mile and about a point and a half on the starboard bow. The tug then ported back, and, whilst crossing the bows of the steamship, was sunk in collision. The tug was found alone to blame for wrongful manœuvring without helm signals:—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), that the steamship was also to blame, for when those in charge saw that, though they had starboarded and steadied, the green light of the tug did not broaden, but was, for an appreciable time, getting finer on their starboard bow, they ought to have realized that there was "risk of collision" within the meaning of the preliminary article to the steering and sailing rules of the regulations for preventing collisions at sea, and they should, therefore, as a matter of seamanship under art. 29, have at once stopped and reversed.

Per Lord Alverstone C.J.: Observations on the functions of the nautical assessors in an Admiralty action.

Appeal by plaintiffs, the owners of the German steam-tug *Carl Kiehn* and the survivors of her crew, and the personal representatives of the remainder of the crew that were drowned, against a decision of Bargrave Deane J. finding the tug alone to blame for a collision with the Dublin steamship *City of Berlin*, owned by the defendants.

The case is reported on the question of the action to be taken under art. 29 when there is "risk of collision" within the meaning of the preliminary article to the steering and sailing rules in the regulations for preventing collisions at sea, 1897. (The material portions of these articles are set out in the judgment of the Lord Chief Justice.)

The facts sufficiently appear from the following judgment delivered in the Court below on June 17, 1907.

BARGRAVE DEANE J. This collision occurred in fine clear weather, and at nearly slack water, in the river Elbe on February 3, 1906, at about 4.45 A.M. by German time, and the result was that one of the vessels was sunk and six out of eight of the crew were drowned. The matter was a very serious one, in consequence of that, and I am sorry to say that the Elder Brethren are not agreed in their views, and the result is that I unfortunately have to give my view of what the judgment should be.

The story is this: The *Carl Kiehn*, which is a small screw tugboat in the river Elbe, with a crew of eight men all told, was proceeding from Brünsbuttel up the Elbe to Hamburg. She had only one man on deck, and he was in the wheel-house on the upper deck steering and in sole charge of the tug. I do not know what her beam may be, but her length was about 100 feet, and by the look of it, in the photograph put in, I suppose her beam would be about twenty feet, or something like that. As the tug proceeded up the river this man, who was the only witness called from the tug, says that he saw, about a mile and a half above him, the lights of a steamer, the red and white, which afterwards proved to be the red and white lights of the *City of Berlin*. I do not think that he said how she bore from him, but we know from the *City of Berlin* that all three lights of the tug were visible to the *City of Berlin* at about the same distance, so that she would probably be right ahead of the tug. At this particular part of the river the light of Brunshausen below was open to both these steamers. The light of Brunshausen seems to be a single light, with three sectors. There is a green sector, which opens to the north of the channel of the river, a white sector, which opens to the centre of the river, and a red sector, which opens to the south of the channel of the river; in the mid-channel is the white sector. The tug says that she was going up the river in the white sector, when she saw these red and white lights ahead of her.

The proper course for vessels navigating the Elbe is to keep to the starboard hand, vessels going down to keep to the north, and vessels going up to the south side, both in the white sector, and therefore the tug ought to have kept to the south on her starboard

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side of the white sector, and the *City of Berlin*, coming down, to the north side of that sector.

These two vessels were meeting almost end on, and the first movement seems to have been on the part of the *City of Berlin*. The *City of Berlin* says: "I saw the three lights of this tug ahead of me, a little on my port bow, and I thought I had better give her a little more room by porting a little, and that took me just on to the green sector line, so that I was well away on my right, or starboard side of mid-channel."

The tug admittedly did wrong. She admittedly starboarded across the bows of the *City of Berlin* into the green sector line, which was her wrong water, on the north side of the river.

The *City of Berlin* steadied, after having ported, as she thought sufficiently; not daring, as she says, to go further into the north shore because of the groynes, she steadied, and that brought the two vessels green to green, both of them on the north side of the channel.

I must now mention, because it is the crux of the case, the speed of these two vessels. The tug was going, according to the man who has been called, from nine to ten knots, and the steamer from eight to nine knots. That makes a joint speed of about eighteen knots. They first sighted each other a mile and a half apart. That distance would be covered in about five minutes at the combined speed. You have to take into account the distance they were seen, the speeds they were travelling at, what they did, and then to bring them together, and you will see how close they were at the point of time. They were green to green, after having performed these two manœuvres, and, according to the evidence of both, they were very fine green to green; I think it is only about a point to a point and a half on the starboard bow of each other.

There is one other fact which is beyond dispute, and that is the photograph of the *Carl Kiehn*, after she was raised, which shews exactly the angle of the blow. The angle of the blow was almost end on. A part of the side of the *Carl Kiehn* seems to have been sliced off. Now you have got them about a point and a half, shewing green to green, and eventually the tug got across the bows of the *City of Berlin* at so fine an angle that it is a slice, and not a cut. That means a very slight turn of the helm.

Now one of these vessels must have ported. According to the tug she starboarded across the bows of the steamer, and then ported back—ported a little, ported a little more, and at the last hard-a-ported. According to the steamer, the two vessels being green to green, the German pilot, who was in charge of the steamer, says that he thought that this green light was narrowing on his green light, that is, getting more end on. That would be for a very short space of time, considering what I have already said, and at the last moment the red light of the tug opened, and there was a collision.

I have already said that the tug starboarded, and then ported three times—ported, ported a little, and then hard-a-ported, but, admittedly, she did not blow a signal blast on her whistle to indicate any one of her movements of her helm. The steamer ported, blew a single blast, and then steadied. Afterwards she starboarded a little to come out from the north shore, and blew two blasts to indicate that she was starboarding.

Therefore, on the one side you have got the steamer giving information of her movements to the tug, but you get no indication from the tug of any single movement she made with her helm.

These are all very material questions to consider, when we have got to come to a conclusion as to whether the *City of Berlin* was to blame in anything that she did, or neglected to do.

We are of opinion unanimously that the tug was to blame. She was to blame for not blowing her whistle, and for crossing the bows of this steamer without any indication whatever of her movements. Further than that, she crossed ahead of the steamer into the steamer's water, and then she came back again across the bows of the steamer. She was manœuvring in a way which undoubtedly is blameworthy and makes her responsible. I do not know what the German law is about the navigation of these small craft, but I confess it seems to me very extraordinary that, with a crew of eight hands, there should have been nobody on the deck of this tug to take charge of her navigation, as a look-out man, or to look after the wheel, or to steer, or to

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be in control, except this one man, who was shut up in this wheel-house on the bridge deck. So much for the tug.

Now, was the *City of Berlin* also to blame?

There are only two matters to which I need refer in respect to the *City of Berlin*. It seems impossible not to be struck with the fact that here was a vessel of 990 tons gross tonnage, with a crew of seventeen hands, which had a master and a chief officer, but no other certificated officer on board. The boatswain, who was not a certificated officer, was acting as second mate. Coming down the Elbe she was in charge of a German pilot, whom we have seen, and who struck me as a very intelligent man, although I am not quite sure that he fully understood all the questions. He was examined in English, and so far as I can judge, he was an intelligent and careful man. The other man on deck was this boatswain, whom we have also seen, who did not strike me as an intelligent man. The master had gone below to lie down, leaving the deck in charge of the officer of the watch—this boatswain and this German pilot to whom I have referred.

No doubt, as far as pilotage was concerned, the pilot was responsible. So far as the ordinary navigation was concerned the man in charge was the boatswain, because the pilot, by German law, is only an advisory officer; he does not take control of the ship, as they do here. I think, and to this extent we are all agreed, that the *City of Berlin* did not do wrong, when she found the three lights of the tug ahead of her a little on her port bow, in porting. She ported to go port to port into her right water, or, rather, in her right water, and then, having got as close as she dare go, she steadied. Then she saw by the lights that the tug had starboarded, and was coming across her bows, and did cross her bows, till she got green to green. So far no blame attaches to the *City of Berlin*.

Then comes the point on which the Elder Brethren are not agreed. It is said by the pilot—I put the boatswain out of the case as of no value to us in this matter—that "being green to green, and very fine, I starboarded a little, and then steadied. Notwithstanding my starboarding it seemed to me that the green light of the tug got no broader, if anything it got narrower, finer, on my starboard bow. I watched it. Suddenly the red light opened, and I was surprised. I immediately ordered the engines to be put full speed astern. It could not be done, because the boatswain was not standing near the telegraph, and I did not realize that he was not doing it, and I did it myself afterwards, but it was too late, the collision happened immediately."

The question we differ upon is this: Ought the pilot who was in charge of the *City of Berlin* to have felt that there was risk of collision when he saw this green light on the starboard bow not broadening when he himself had starboarded? He cannot have starboarded much, or else the angle of the collision would have been different. If he had starboarded much, and the other vessel had ported, the angle would have been certainly a two-point angle, whereas it must have been almost end on. Therefore there must have been an alteration just at the last moment, but the vessels must have been very nearly end on just before the last moment. It seems incredible to us that this tug should have ported as she did, unless it was suddenly borne in upon the mind of this individual on the deck of this tug that he was under the bows of a big steamer. Ought the pilot of the *City of Berlin* to have reversed his engines when he found that on starboarding the green light did not broaden?

I am in the unfortunate position of having to decide in this case between the two Elder Brethren, whose advice is so valuable to me, and I hesitate when I find two seamen differing upon such an important question. But it seems to me that I have to take into consideration, not only the moment of the collision, or the few moments before the collision, but I have to take into account the whole of the story over these five minutes—the whole conduct of this tug in dodging about as she was doing—the fact the pilot gives us, that in the Elbe these tugs are always dodging about, you never know which way they are going to pass you, or what they are going to do. They think nothing of keeping in their own water. They are constantly in the wrong water. Am I to say that this pilot ought to have seen that this tug was going to throw herself suddenly under his bows at the last moment? It is not in the open sea, but in a narrow channel—a narrow river—where you have to pass fairly close.

I confess, taking the whole of this story together, I cannot say that in my opinion this pilot was bound to have seen that there was risk of collision before the time when this red light opened. It is a very narrow line; but I do not feel bound to take it, and therefore my view is that that which is the only point on which the owners of this vessel can be held in fault, namely, the failure of the pilot to reverse his engines before the collision, has not been established.

I wish to say this about the *City of Berlin*. She was going from Hamburg to Bristol with a general cargo, and it is not, I think, right that a vessel coming from Hamburg to the sea should, even if there is a responsible pilot on board, be left without a certificated officer on deck. If there is no second officer to a ship, then either the master or the chief mate should be on deck and in charge. It seems to me to have been improper, where it is not a case of compulsory pilotage, that there should have been no certificated officer on the deck of the steamer, and that she should have been left in charge of a boatswain such as we have seen here in court before us.

For the reasons I have given, so far as this collision is concerned, I have to put my own opinion forward, supported by the opinion of one of the Elder Brethren against the view of the other, that the tug is alone to blame for this collision. As I have stated already, we are agreed about the tug being to blame. The only question upon which we are not agreed is whether the *City of Berlin* ought to have reversed her engines after the vessels came green to green.

1907. Oct. 23, 24. *Laing*, *K.C.*, and *Stubbs*, for the appellants (plaintiffs), owners of the *Carl Kiehn* and others. Admitting that the *Carl Kiehn* is to blame, it is submitted that the *City of Berlin* is also to blame, for, by the preliminary article to the "steering and sailing rules" (17 to 27), it is laid down that risk of collision "should be deemed to exist" if "the bearing (of an approaching vessel) does not appreciably change," and the pilot of the *City of Berlin* saw, and had ample time to realize, that the green light of the tug was not only not broadening, but getting finer on his starboard bow. He should, therefore, at once have stopped and reversed. Instead of that he waited, and as a matter of fact, through some misunderstanding, the order to reverse, when given, was not conveyed to the engine-room, and the *City of Berlin* was going full speed ahead at the time of the collision.

Aspinall, K.C., and *Dumas*, for the respondents (defendants), the owners of the *City of Berlin.* Under art. 18 of the rules of 1884, following earlier provisions to the same effect, there was an imperative obligation on a steamship, " when approaching another ship, so as to involve risk of collision, to slacken her speed or stop and reverse, if necessary," and in *The Khedive* (1) a rigid observance of the rule was enforced; but the rule has now been altered (art. 23) and limited in its application to the case of a " steam vessel directed by these rules (viz., arts. 19, 20 and 24) to keep out of the way of another vessel," and the word " or " is substituted for the word " and " with regard to reversing. The result is that stopping and reversing, under such circumstances as those in this case, is a matter of seamanship under art. 29, and reversing in a narrow river is not a step that a prudent seaman will take if it can be avoided, as he is likely thereby to lose the control of his vessel. It is submitted that the pilot was justified in thinking that the tug would endeavour to get back to her own right side of the channel, and would do so by going, not across the bows, but under the stern of the steamer, and if the pilot had stopped and reversed sooner he would have frustrated that manœuvre. The finding of the learned judge in the Court below is that it would not be reasonable to hold the pilot of the *City of Berlin* to blame for not instantly realizing that the tug was suddenly throwing herself across his bows, that is to say, " the failure of the pilot to reverse his engines before the collision has not been established," for the " pilot was (not) bound to have seen that there was risk of collision before the time when this red light opened," and it is material to notice that the Elder Brethren in the Court below differed in their opinion on the question of negligence.

Laing, K.C., was not called upon to reply.

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(1) (1880) 5 App. Cas. 876.

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LORD ALVERSTONE C.J. In this case we have to decide whether the judgment of the Court below is right in finding the tug alone to blame, the blame of the tug not being now disputed.

Before I deal with this case, I wish to make an observation with reference to the position of the Elder Brethren in the Court of Admiralty and of the assessors in this Court. The language of the learned judge, no doubt by inadvertence, rather seems to have treated the Elder Brethren as constituting the Court, and I understand that this case was reargued because there was a difference of opinion between the assessors. It may, of course, be desirable under some circumstances to adopt that course, but I think it wise just to point out that, whatever may be the opinion and advice given by Elder Brethren in the Admiralty Court, who are there to assist the Court, as are our assessors here, the decision, both of fact and law, is the decision of the Court, and we cannot shelter ourselves, nor can the judge of the Admiralty Court, by the opinion of the assessors or of the Elder Brethren. Dr. Lushington said in *The Alfred* (1): "If I had entertained a contrary opinion (to the Elder Brethren), notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, that it would be my duty to pronounce such contrary opinion." And in *The Magna Charta* (2) Sir Joseph Napier said in the Privy Council: "It has been said that there was a difference of opinion between those gentlemen by whom the learned judge of the Admiralty Court was assisted; that they took a different view of the case; and that, when the case was referred to the Elder Brethren of the Trinity House, a difference of opinion existed there. It was, however, the duty of the learned judge to decide the case upon his own responsibility. The learned judge has got the responsibility cast upon him of arriving at a judicial conclusion. He is advised and assisted by persons experienced in nautical matters; but that is only for the purpose of giving him the information he desires upon questions of professional skill; and having got that information from those who advise him, he is bound in duty to exercise his own judgment, and it would be an abandonment of his duty if he delegated that duty to the persons who assisted him." I am not for a moment suggesting that Bargrave Deane J. did not decide this case on his own responsibility, but I think a little too much appears to have been made in the Court below of the fact that in this case the Elder Brethren differed from one another. They certainly must not be regarded as being members of the Court in the sense of being responsible for the decision given.

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(1) (1850) 7 Notes of Cases, 352, at p. 354.

(2) (1871) 1 Asp. M. L. C. 153, at p. 154.

A very able argument has been addressed to us by counsel for the respondents, mainly based upon calculations which must always be received with some caution—that because the time was very short during which these vessels were in sight of one another, taking a combined speed of eighteen knots, something like three minutes and a third, the action of the pilot of the *City of Berlin* was such that you cannot impute to him negligence in not having stopped and reversed. I quite agree that the old rule which made it imperative upon both ships to slacken their speed or stop and reverse, if necessary, when approaching, so as to avoid risk of collision, has been altered, and is now replaced by art. 23, which says: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." According to art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." Therefore the question of stopping and reversing, apart from the obligation under the rules with reference to the vessel which has to give way, depends now upon the general rules of navigation which are preserved by art. 29: "Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." It ought not to be forgotten that so important has the question of bearing been considered that there is a preliminary article to the "steering and sailing" portion of the rules stating that "risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist." I believe that was put in the rules in consequence of a very learned argument of Mr. Cohen in the House of Lords, where it was pointed out that there was a mathematical certainty of vessels coming into collision if their bearings did not change for an appreciable period of time, and they kept their respective courses and speeds.

In this case the *City of Berlin* rightly ported for the purpose of getting a little nearer over to her starboard hand, and, in my opinion, it cannot properly be suggested, that there was any erroneous navigation in the *City of Berlin* from the fact that she ported. She appears to have starboarded a little afterwards, the reason being given by the pilot that he got as far over as he could, and the other vessel, the tug, for reasons which we really cannot exactly ascertain—it is said by the *City of Berlin* because the tug people are very careless in the river Elbe—had got over on to the starboard bow of the *City of Berlin*, it is said even into the green sector. Under these circumstances, at a distance which cannot be quite inappreciable, at the very last moment the pilot of the *City of Berlin* observes the green light upon his starboard bow, and he observes that while he has steadied his helm that green light does not broaden upon his bow, but is even getting finer. He says in cross-examination—and I think also in chief in effect, but in cross-examination distinctly—that "he was getting nearer us. He was not getting no broader all the time as that, I suppose, he was getting a little more to us." "Q. You starboard a point when he is about half a point or a point; that would bring him a point and a half or two points on your starboard bow, and he is about half a mile to three-quarters of a mile away, something like that?—A. Yes, about that. Q. Did he get any broader from that time, or did he get narrower all the time?—A. He got narrower all the time. Q. That looks like as if he was porting back again, does it not?—A. Yes, he was coming more over again to the south side. Q. That would be with a port helm?—A. Yes, of course. Q. And giving no signals of any kind?—A. No. Q. Then he keeps coming over to the south side, gradually edging over to the south side, as I understand?—A. Yes. Q. And then you see his red light?—A. At once, yes. Q. And when you see his red light he is what—half a ship's length from you?—A. Not more. Q. It looks to me, from what you say—tell me if I am right or wrong, that after getting on your starboard bow about a point or two he is edging away to the south to get back to his right side?—A. Yes, the angle was getting sharper; of course he was not so much on the starboard side the last time as he was at the first." Therefore it cannot be suggested that this was anything very sudden. That is why it is dangerous to rely upon calculations, however accurate they may be, assuming certain facts as to the length of time. The pilot is not describing the action of the vessel suddenly porting and coming unexpectedly across his bows. He is describing an action which he can see and watch for an appreciable period of time, and he describes it as gradually edging in towards him. Counsel for the respondents have said that that would be the effect if he was porting only sufficiently to go under the stern of the other vessel. I am afraid I cannot agree with that. I am afraid if he was only porting sufficiently to go under the stern, the green light must have got broader, certainly would not have got narrower. But, be it as it may, the suggestion, however ingenious, is one which I cannot think a sufficient excuse for the pilot. I cannot help also pointing out that very soon after that, possibly when the red light opened—I should doubt the red light being as close as suggested—the man appreciates the necessity of stopping and reversing, and gives the order. He thought the order was being obeyed by the boatswain. He did not know the telegraph was close by himself, and afterwards at the time of the collision he looks and finds the engines are still going full speed ahead. That points to neglect on board the ship with regard to the stopping and reversing of the engines quite independently of the misjudgment of the pilot.

Looking at the whole of the case quite apart from any advice we receive, I cannot help thinking that the ordinary construction, according to good seamanship, which ought to be put on the rules as applied to this state of circumstances, is that a reasonably prudent man would have seen that this vessel was approaching him at a short distance, involving very serious risk of collision.

Lord Alverstone C.J.

I am glad to say that we are not in the difficulty that my brother Deane was in in the Court below, because we are advised by both our assessors that this steamship ought to have stopped and reversed. Under those circumstances I think we must differ from the conclusion of the learned judge. I must say I have less hesitation in doing so, because, in the first place, we have the advantage of the advice I have indicated, and, next, passages in his judgment shew that he had very considerable doubt about it. He says: "It seems to me that I have to take into consideration, not only the moment of the collision, or the few moments before the collision, but I have to take into account the whole of the story over these five minutes—the whole conduct of this tug in dodging about as she was doing. . . . I confess, taking the whole of this story together, I cannot say that in my opinion this pilot was bound to have seen that there was risk of collision before the time when this red light opened. It is a very narrow line, but I do not feel bound to take it." In my judgment that is not giving sufficient effect to the instructions that are put in the opening words just before art. 17. I think the learned judge ought to have taken the view that, after the man had made the admissions he did make to the appellants' counsel in cross-examination, it was established that he had, for a substantial period of time, failed to appreciate that the tug was not only not going safe, but must have been porting across his bows, and he ought immediately to have stopped and reversed. I am, therefore, of opinion that the appeal should be allowed by the *City of Berlin* being found to blame as well as the tug.

BUCKLEY L.J. I agree. The question here is not how the *City of Berlin* ought to have used her helm at the relevant time or at the critical time. The question is whether there was not risk of collision so that that vessel ought to have stopped and reversed. The cardinal facts are that at the relevant time the two vessels were green to green, and that the tug was fine on the starboard bow of the *City of Berlin*. As time went on that green light did not broaden, but narrowed. Whether regarded as a mathematical proposition, or as an application of the matter preliminary to art. 17, it is the fact that if the bearing does not appreciably change for a sufficient period of time, there is risk of collision. If the light narrows during that time, that must indicate that the tug is so changing her position as that she will pass the point of danger at a slightly earlier time than if the bearing did not change; in other words, she is coming across the bow of the *City of Berlin*. The only question is whether she will get past the point of danger before the *City of Berlin* gets there. Under those circumstances there must be risk of collision. Now it may be, and I think it is, the fact that under the new rules, as art. 23 is now expressed, the ship may probably defend herself by proving that by continuing her speed she was reducing the risk of collision. But nothing of that kind is, of course, shewn here. It seems to me that there was risk of collision; that the *City of Berlin* was bound, not necessarily, I agree, under art. 23, but under art. 29, which brings in the ordinary practice of seamen—that she was bound under those circumstances to stop and reverse. For not doing so I think she was to blame.

KENNEDY L.J. I am of the same opinion, and I am bound to say, having regard to the very fair and frank evidence of the German pilot on board the *City of Berlin*, it seems to me to be an unusually plain case.

The vessels were approaching each other at a comparatively short distance, having regard to the great speed—a distance that would be quickly traversed. One vessel had been brought a point and a half to two points on the starboard bow of the other, and instead of broadening, as it would have done if they had been simply keeping their courses, the green light actually narrowed, shewing that there was an action of the port helm on the part of the vessel which was approaching the other. It is quite clear, as Buckley L.J. has said, that there must come a point if that operation is being continued close upon the bow, perhaps less than a point—there must come a point at which they will actually be end-on exactly, and a further point, if there is time to traverse so much ground, at which the red will be actually across the bows of the vessel which had been maintaining her course. When I see what the pilot said—I do not want to repeat what my Lord read, but to add a passage further down in the print—I cannot conceive a plainer indication of what ought to have been done than is given by the very fair statement of the pilot himself. He speaks of giving the order—which, unfortunately, was not carried out on board the ship—after the red light was visible, to go full speed astern. "Q. And then you see his red light?—A. Yes. Q. And then it is too late to do anything?—A. Yes. Q. Do you not think you might have taken your speed off seeing the position that vessel was in?—A. I would not say it was right"—that is to say, that what I did was right—"but I have thought of no danger, because he was passing green to green, and, as usual in the river, you know that with the small tow-boats they usually keep on the wrong side of the river." If they usually keep on the wrong side of the river it was exactly what he was not doing on this occasion. Because, as has been pointed out by the learned counsel for the respondents, they say he was making an unfortunate action to get on the right-hand side, but that is not the view of the pilot. Now comes what I am afraid is the secret of the whole thing: "We do not take any notice of them in the Hamburg river." Well, I can only hope they will do so in the future. The more casual the management may be, the less right you have to count upon seamanlike action, the less right you have to suppose that this vessel was deliberately endeavouring to port its helm just in time to shave round the stern of the other vessel. If you know that they do do such things, and unfortunately are sometimes careless, the rules of the sea, as well as the dictates of humanity, point to the importance of obeying that which was always a rule of seamanship before these rules at all, namely, stopping and reversing, which, if it does not avoid a collision, may easily, in fact naturally does, if there is an impact, tend to minimize the violence of that impact and so save human life.

Appeal allowed with costs: No costs in the Court below.

Solicitors for appellants (plaintiffs), the owners of the *Carl Kiehn* and others: *Stokes & Stokes.*

Solicitors for respondents (defendants), the owners of the *City of Berlin: Pritchard & Sons.*

T. L. M.

[IN THE COURT OF APPEAL.]

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Admiralty—Collision—Crossing Rule—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, *note.*

Two steam-vessels approaching one another at a combined speed of twenty knots, on nearly opposite courses, were "crossing" vessels within the meaning of art. 19 of the regulations for preventing collisions at sea, and the vessel having the other on her own starboard side, and therefore bound to give way, had just crossed the other's bows and reached, at a very short distance ahead of the other, a position of safety, green to green, when she suddenly ported. Those in charge of the vessel bound to keep her course and speed, seeing the masthead lights of the giving-way vessel coming into line, stopped and reversed; but her stem struck the port side amidships of the giving-way vessel and sank her:—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), affirming the decision of the Court below, that the giving-way vessel was alone to blame for improper porting, and that the other vessel, finding herself in the position indicated by the note to art. 21, that is, so close that collision could not be avoided by the action of the giving-way vessel alone, had, as soon as the danger became apparent, taken such action as would best aid to avert collision.

Per Kennedy L.J.: Observations on the nature of the assistance to be rendered by nautical assessors to a Court sitting in Admiralty.

Appeal by plaintiffs, the Isle of Caldy Steamship Company, Limited, and the master and crew of the *Isle of Caldy*, proceeding for their effects and the owners of the cargo lately laden on board, against a decision of Bargrave Deane J., pronouncing that vessel alone to blame for a collision with the steamship *Koning Willem II.*, owned by the defendants.

The case raised the question whether those in charge of the *Koning Willem II.* had taken action soon enough under the note to art. 21 of the regulations for preventing collisions at sea, 1897. (1)

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(1) Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

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On July 15, 1906, about 2 A.M., a collision occurred in the North Sea, some ten miles to the northward and eastward of the Sandettie lightship, between the *Isle of Caldy*—a screw steamship of the port of Liverpool, of 1381 tons gross register, engines of 125 horse-power nominal, and a crew of eighteen hands with a Dutch pilot, on a voyage from Huelva to Amsterdam with a cargo of copper pyrites—and the *Koning Willem II.*, a steel screw steamship of the port of Amsterdam, of 4300 tons gross register, a crew of 101 hands, engines of 750 horse-power nominal, from Amsterdam to various ports in the East, via Southampton and Genoa, with a general cargo and about eighty passengers. The *Isle of Caldy* was on an E.N.E. course magnetic, making about seven knots through the water, and the *Koning Willem II.* was steering W.S.W. ⅛ W. magnetic, and making about thirteen knots through the water.

The facts relating to the collision, which resulted in the sinking of the *Isle of Caldy* and the loss of two of her crew, sufficiently appear from the following judgment, delivered in the Court below on July 15, 1907.

BARGRAVE DEANE J. The real question which I have to decide is, first of all, which side is telling the more probable story, and with regard to that I start with this, that I think that the evidence of the witnesses from the *Isle of Caldy* is very unsatisfactory. The master knew practically nothing; he was called up on deck just before the collision, and does not know very much about it. The second mate, who was examined on commission, was certainly a very stupid man, to put it mildly, but his evidence was very confused and not at all satisfactory. The man at the wheel was the best of them all as far as clearness goes. The look-out man was, if possible, more stupid than the second mate. The look-out man appears to us to have kept a very bad look-out, because, although he says he saw the lights of this vessel some mile or two away, up to the time he came into Court he did not know that she was carrying two masthead lights, and he does not seem to have reported two masthead lights. According to his own evidence, he reported nothing but a fishing vessel, which was the only report he made, and he says

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that that fishing vessel passed him before the collision on his starboard side. So it comes to this, that he really never saw and never reported the *Koning Willem II.* at all. That is the look-out man. The second officer says that he reported a white light, that would be consistent with his seeing a fishing vessel; but, putting the whole case together, I am left in a very unsatisfactory condition as to what was going on on board the *Isle of Caldy* at the critical time.

Then there is another difficulty in the case. The weather, according to the preliminary act, is stated by those belonging to the *Isle of Caldy* to have been overcast and hazy, by those on board the *Koning Willem II.* to have been fine and clear, but overcast. It was on July 15 last, in the early morning, that the collision happened, and we all know that last July was a very hot month, and it may very well be, and the Elder Brethren advise me in this, that it is possible that at that time, although it may have been fine and clear, there may have been a haze on the water which deceived those on board both ships.

In my opinion these ships did not sight each other so far off as they think they did, and throughout the whole case the distances are exaggerated, not intentionally, but owing to the haze which made both of them fail to appreciate the distances.

We are all agreed that the *Isle of Caldy* was to blame. We think that she was not keeping a good look-out, and we think that she crossed on to the starboard bow of the *Koning Willem II.* so as to be green to green; a crossed vessel having the other one on her starboard side, she had no business to port, and we think she improperly ported across the bows of the *Koning Willem II.* On these grounds, it is our opinion that the *Isle of Caldy* is to blame.

I always like to state, for the advantage of those who are concerned in these cases, when it is that the Court is not at one; and the Court is not at one in this case, as to the responsibility attaching to the *Koning Willem II.*

She was navigated by the chief officer, and he has given us a very clear account of what happened; he again, we think, exaggerated the distances at which the light was seen, not only at first, but afterwards. The description given us by the man on the look-out agrees with his, that at some considerable distance the two masthead lights of the *Isle of Caldy* were seen on his port bow, crossing to starboard. He still kept observation on them; when from three to four ship's lengths off him, and bearing only half a point to three-quarters of a point on his starboard bow, he noticed the two masthead lights coming into one, which indicated to him that the vessel was porting, and then she opened her red light and crossed his bows. At that time, he says, he ordered his engines to be put full speed astern, he blew three blasts on his whistle, and he starboarded his helm

The point where the Court does not agree is as to what ought to have been done, or not done, by the *Koning Willem II.* The majority of the Court is of opinion that the *Koning Willem II.* is free from blame. She, the *Koning Willem II.*, could do anything—she could starboard, she could port, or she could go astern; and the question is whether she had time to do any of those three things when she became conscious that danger was imminent.

The question of distance is most material. If the *Isle of Caldy* was three to four ship's lengths off, half a point on the starboard bow of the *Koning Willem II.* when she shewed her red light, then the Court is of opinion that she would have cleared the *Koning Willem II.* crossing from starboard to port of the *Koning Willem II.* If she was further off of course she would have cleared her more, if she was closer the collision would have taken place.

In the opinion of the majority of the Court she was closer than three to four ship's lengths.

One member of the Court is of opinion that you must take her own evidence as to the distance, and, that being the case, she ought not to have kept her speed so long and ought to have starboarded as soon as she saw this green light on her own starboard bow, and it is pointed out that the chief officer was under a misapprehension when he talked of the duty imposed upon him being to keep his course and speed. That is not so; as soon as you get the other vessel across your bows, as soon as you are shewing green to green, you are entitled to starboard to give a little more room. If he had ported and the other vessel had changed her mind, he would certainly have been in the wrong—

he would have ported to a green light. Had he time to reverse sooner? Then comes again the question of distance. If it was a greater distance than the majority of the Court believes it was, then of course he might have reversed and gone astern sooner, but I see no reason to doubt that he reversed at the very first moment that he really saw these two white lights changing their position and getting into one. My belief is that the *Isle of Caldy* was then well within four ship's lengths of him, and that the collision took place by reason of the *Isle of Caldy* throwing herself across his bows. If the *Koning Willem II.* was going, as she says she was, thirteen knots an hour, which would be 450 yards in a minute, that would be about three or three and a half of her own ship's lengths. She is said to be 400 feet long, and it seems to me, although I am not at one with both my assessors, that at three and a half ship's lengths the *Isle of Caldy* was too close for this collision to have been avoided.

The result is that, in my opinion, in which I am supported by one of my assessors, the whole fault of this collision was with the *Isle of Caldy.* I have pointed out, and I wish to emphasize it, that the chief officer of the *Koning Willem II.* was manifestly wrong in his interpretation of the rule when he thought that the ship that had crossed him was a crossing ship. As soon as a vessel has crossed she ceases to be a crossing vessel. He interprets the rule as being a crossing ship after she had crossed.

However, that does not affect our judgment in the matter, and the result is that, although the chief officer was wrong in his view of the rule, we do not think it affected the collision.

The *Isle of Caldy* is alone to blame.

On appeal:—

1907. Oct. 24. *Laing, K.C.*, and *Dawson Miller*, for the appellants (plaintiffs), the owners of the *Isle of Caldy* and others, whilst admitting that the *Isle of Caldy* was to blame for bad look-out, and sudden and improper porting, urged that those in charge of the *Koning Willem II.* were also to blame, under the provisions of the note to art. 21 of the regulations for preventing collisions at sea, as they had not reduced their speed soon enough. These arguments sufficiently appear from the judgment of the Lord Chief Justice.

Aspinall, K.C., and *D. Stephens*, for the respondents (defendants), the owners of the *Koning Willem II.*, relied on the evidence, which is set out in the judgment of the Lord Chief Justice, as shewing that the officer in charge of the *Koning Willem II.* was on the alert, and, as a matter of seamanship, complied with the provisions of the note to art. 21 by reversing his engines as soon as the coming into line of the masthead lights of the *Isle of Caldy* indicated danger. As to the difficulty of determining the moment when art. 21 is to be set aside, and the note to that article acted upon, reference was made to Marsden's Collisions at Sea, 5th ed. (1904), p. 409, and to the observations of Sir Gorell Barnes in *The Ranza* (1); also to the remarks of James L.J. in *The Bywell Castle* (2) as to the reasonable view to be taken of the action of the officer in charge when suddenly placed in a position of peril.

LORD ALVERSTONE C.J. I hope nothing that I shall say in this case will in any way be thought to affect the duty of seamen to stop and reverse when there is any real indication of danger, because, as I said, on a previous occasion, with the approval of my brother Kennedy L.J., I know of nothing that has done more to prevent collisions or minimize their gravity than stopping and reversing. I say that after a long experience of these cases. But, in my judgment, we must be very careful lest, in wishing to impress upon those who navigate the seas the duty of stopping and reversing as soon as there is any real danger, we work an injustice; unless we find that there has been negligent navigation.

There are one or two things which I wish to point out with regard to the law in this case before I come to consider the facts. It is admitted that this is only a question of seamanship. There is now no rule which makes it obligatory upon a vessel in the position of the *Koning Willem II.*, in any view of the case, to stop. I agree with counsel for the respondents that in dealing

(1) Ship. Gaz., Dec. 13, 1898.

(2) (1879) 4 P. D. 219, at p. 223.

with seamanship we have also to apply the principle which was laid down by James L.J. and Lord Esher in *The Bywell Castle* (1), and in other cases, that when a man is put in a position of difficulty he has a right to consider what is his best course before he takes action.

The rules which are applicable in this case are arts. 19, 21, and 22: 19 being that the steamer which has the other one upon her starboard hand has to get out of the way; 21, that the steamer, which has to keep her course, shall keep her course and speed; and 22, that the steamer which has to get out of the way shall, if the circumstances of the case admit, avoid crossing ahead of the other. Under those circumstances, it is not disputed (for counsel for the appellants has most fairly said that he would take the evidence of the *Koning Willem II.*) that the *Koning Willem II.* was on a course which would put the *Isle of Caldy* originally on her port bow with the *Isle of Caldy's* starboard side open, the *Koning Willem II.* being upon the starboard side of the *Isle of Caldy*, or, in other words, rule 19 applied. The other facts of the case, for it is a night collision, absolutely support that view, for the *Isle of Caldy* sees the red light after she had seen the masthead light of the *Koning Willem II.*, and the *Koning Willem II.* sees the green light of the *Isle of Caldy*. It has not been sufficiently considered, that the vessels were going on very fine courses with reference to one another; that there was not a difference between their courses certainly of more than half a point, probably not so much; and, although it was the duty of the *Isle of Caldy* to get out of the way and the duty of the *Koning Willem II.* to keep her course, the result would be that, if they cleared, the *Isle of Caldy* would pass ahead, not broad across the bows of the *Koning Willem II.*, but very fine across the bows. Whatever distance it is, it will be a very acute angle between the two courses. The keels of the vessels will be not far off being in a line with one another. Under these circumstances, at what period of time is the *Koning Willem II.* to break or depart from rule 21? In my judgment, it must be at such a time as the *Isle of Caldy* has given an indication that she is going to do something which brings about a position of danger,

(1) 4 P. D. 219.

or, in other words, shews that she is not only disobeying the rule, but is disobeying the rule in circumstances in which a seaman will see that he must do something. What the *Koning Willem II.* has to do in the emergency depends entirely on good seamanship. We are advised by both our assessors that, if the officer in charge of the *Koning Willem II.* stopped his engines within as reasonable a time as he could on seeing the two white lights come into line, it was as soon as he could be expected to act. I venture to say, as I put it to counsel for the appellants in the argument, the only incident in the case which would not only lead him to act, but justify the *Koning Willem II.* in acting, was that coming of the two white lights into one, shewing that she was altering under her port helm. When did that happen? We have heard a great many arguments which were well entitled to consideration based on the fact that the blow was apparently a broad blow. How much was due to the final hard-a-porting of the *Isle of Caldy* no one can now tell. It is not possible to say what sort of vessel she was with reference to her helm. What the exact angle was no one can say, though I think it must certainly have been of considerable broadness—whether as much as five points or not. But, in my judgment, assuming the case to be determined by the test which I have already mentioned, namely, whether or not the officer in charge stopped his engines as soon as he saw the two white lights come into one, there is nothing in these theories to shew that that cannot have been the case. If you take the evidence of the chief officer of the *Koning Willem II.*, an account is there given which struck me at the time as being the account of an intelligent man, and which, if a truthful account, would correspond with what was going on, as I have already described, as to the courses of these vessels and their original bearing. "Q. How did you think this other vessel was going to pass you?—A. He should have passed me green to green. Q. What did he do?—A. When he was about three-quarters of a point on my starboard bow I saw his masthead lights altering, so I said to the fourth officer, 'Look, the ship is going to alter its course.' A little moment afterwards I saw the two masthead lights in one line, and immediately I thought there should be danger, and I rang my telegraph 'Full speed

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astern.'" I asked myself in the course of this argument—I put the question to myself, not to counsel—"If that is so, could this man be reasonably expected to act earlier?" Continuing: "Q. How far away was he from you when you appreciated that she was porting?—A. When I noticed it the first time? Q. When you noticed it, yes?—A. About three or four ship's lengths—four ship's lengths I should say." That would be somewhere about 400 yards. "Q. You ordered your engines, you say, full speed astern. Did you use your whistle?—A. Yes, the fourth officer was standing close to the telegraph. He rang the telegraph 'Full speed astern,' and I pulled my whistle two or three times." It is quite true, in cross-examination, there is one answer in which he says that he did not, I think, put his engines astern, or alter his speed until he was about one and a half ship's lengths away. Speaking for myself, at the time the answer was read, I certainly did not think the question was an easy one for a foreigner to appreciate; but, taking it as it is, I am only in the difficulty which learned judges have been in in cases before of having to deal with witnesses who have given some answers that cannot be reconciled exactly with their previous answers. Then again, in the same way, the answer given by the fourth officer, who I do not think was a very intelligent man, in cross-examination—he certainly does not contradict the chief officer, but, when it is put to him, that it was a position of serious danger about three-quarters of a point on the starboard bow, he does say, "No, it was green to green first." "Q. That was a position of great danger, was it not, if she continued to alter?—A. If she continued to go right ahead, the ships would get clear, green to green." That man's evidence was not by any means as much in favour of the *Koning Willem II.* as the evidence of the officer to whom I have referred.

Now, how has Bargrave Deane J. dealt with this? It is true that in his judgment, when stating the whole story, he uses language which rather looks as though he may have thought the man did not give the order to reverse the engines full speed astern until the red light was seen, because he says "he still kept observation on them, when from three to four ship's lengths off him and bearing only half a point to three-quarters of a point on his starboard bow, he noticed the two masthead lights coming into one, which indicated to him that the vessel was porting, and then she opened her red light and crossed his bows. At that time he says he ordered his engines to be put full speed astern." "At that time" means when she opened her red light, and certainly I should have thought it, I will not say clear, but open to argument, that the man had not acted quite soon enough. It would not be a very long time, but I doubt whether it would be longer than the man was entitled to think "when the other fellow pulls the wrong rein," to use Lord James's illustration. But I agree with the argument of counsel for the respondents that the real finding of the judge on this is lower down in his judgment:—"Had he time to reverse sooner? Then comes again the question of distance. If it was a greater distance than the majority of the Court believes it was, then, of course, he might have reversed and gone astern sooner, but I see no reason to doubt that he reversed at the very first moment that he really saw these two white lights changing their position and getting into one." That, in my opinion, is a recognition of the truth of the story as told by the chief officer, and I think that is what the learned judge intended to find.

I come to the conclusion on the question of fact that we ought not to differ from the learned judge. I think he has found, as a matter of fact, that the vessel, the *Isle of Caldy*, got green to green, brought about this collision wholly by porting at the last moment, and that, as soon as the officer, who had every reason to believe the vessels would have gone safe, however much the *Isle of Caldy* may have been cutting it fine—as soon as he appreciated that this vessel was porting, he stopped and reversed his engines on his becoming aware of the only incident in this case which would justify his so acting. I desire to point out, and I am glad attention was called to it by learned counsel, that there is strong corroboration of the view I take that Bargrave Deane J. was right when he said that the man reversed his engines as soon as he became alive to the fact that the vessel was porting. Of course, it takes time. You have got to telegraph, and the engineer has to act. There is evidence from the engineer that he was going astern before the collision half a minute. The united speed of these vessels, as they were meeting, was just over twenty knots. Taking it at twenty knots, if it was half a minute or anything like it, it would be a distance of something like between 300 and 400 yards, which corresponds very nearly indeed with the suggestion of it being from three to four ship's lengths.

I therefore come to the conclusion, whatever discrepancies there may be—and I should be very much surprised if in any Admiralty cases there were not discrepancies—that Bargrave Deane J. has believed the story that the *Koning Willem II.*, the ship whose duty it was to keep her course and speed, did keep that course and speed until she became aware of the fact that the other vessel was improperly porting fine upon her starboard bow, and, having become aware of that, stopped and reversed her engines.

I have only one other word to add, but it seems to me of importance. We have always difficulties in these cases through contradictions, and what has been pointed out by greater judges of the Admiralty Court than I can ever hope to be is this: You have to look at the story as a whole, and see if you can, upon the evidence, come to a conclusion on some theory which will really reconcile the conflicting stories. In my judgment this story becomes perfectly plain if you accept the view that the *Isle of Caldy*, having a bad look-out, and having got fine, green to green, becomes suddenly alive to the presence of the *Koning Willem II.*, and, knowing that her duty under rule 22 is to go under her stern, improperly ports at the last moment. She finds at that moment she has still got upon her starboard bow a steamer which she has not noticed before, and, appreciating that it is her duty to get out of the way under these circumstances, and not appreciating what is the bearing of the other vessel and the direction she is going, at the last moment, when she ought not to have done it, ports. Because it must be observed that it is assumed on both sides in this case that at one time these vessels were green to green. If green to green, there was clearly no necessity for the *Koning Willem II.* to stop, and in my judgment this collision occurred because those on the *Isle of Caldy* did not keep a proper look-out, became aware of the presence of the *Koning Willem II.* much too late, and then, knowing that it was their duty to get out of the way, obeyed the rule in a way which brought about this danger. I cannot see the slightest reason for thinking that the *Koning Willem II.* ought to have stopped until the *Isle of Caldy* began to alter her course. I agree with the view taken by Bargrave Deane J. that the officer in charge did act as soon as he became alive to the fact that this vessel was, as he says, altering or about to alter her course under the port helm. I think, therefore, this appeal must be dismissed.

Buckley L.J. Down to a moment it was the duty of the *Koning Willem II.* to maintain her course and speed. At a moment she altered her course and speed. The question here is whether she ought to have done so at an earlier moment. The position of affairs was that, at the critical moment, the *Isle of Caldy* was shewing her green light fine on the starboard bow of the *Koning Willem II.* It was the duty of the *Isle of Caldy* to get out of the way. If she had kept or put her helm to starboard and got further away she would have cleared the *Koning Willem II.* The latter was entitled to say, "It is her business to get out of the way. How it is for her to do it, is for her to determine. My duty is to keep my course and speed." But at a particular moment the *Koning Willem II.* ascertained that the *Isle of Caldy* was altering her course. She found that the two masthead lights were coming into line, and that obviously the *Isle of Caldy* was porting her helm and coming round to starboard, and a collision was imminent. At that moment there was a new duty cast upon the *Koning Willem II.* To my mind the point is: When did that occur? I was impressed by the evidence of the defendants' fourth officer, but I ought not to shut my eyes to the whole of the evidence in the case. If it had been for me to determine the question of fact I should have arrived at the conclusion that the evidence most to be relied upon was that of the officer in charge of the defendants' ship, and that the true meaning of his evidence is that directly he found the two lights coming into line he did take steps to check the speed. Whether I should have been right in that or not, it is, I think, a question of fact to be determined as between differences of evidence given by different witnesses, and the learned judge who heard and saw the witnesses is a much better judge than I am in that respect. He says: "I see no reason to doubt that he reversed at the very first moment that he really saw these two white lights changing their position and getting into one." I accept that finding of fact as being the right finding of fact, and, that being so, I think the *Koning Willem II.* was not to blame.

KENNEDY L.J. I agree. I have one or two things I desire to add. In the first place, I think the cardinal matter to me here is this : that the learned judge who has heard the case with very great care has found obviously from the passage just read by Buckley L.J. a fact—a fact depending partly on the credibility of the witnesses, partly also on the inferences of probability as they may appear to him upon that evidence. I should not feel justified, even if I were inclined to take a different view, in my opinion, in reversing a judgment where it depends upon a definite finding of fact, unless it is made clear to me that there was some mistake as to the evidence, or that there was an omission to consider something in the evidence which ought to have been considered.

I think here the case was evidently considered throughout with very great care, and I should not feel myself justified, upon a pure question of fact for the judge, in reversing the decision. I will say in passing—and I am quite sure I say it with profound respect for the learned judge—I think it is important to bear in mind what seems to my mind, I confess, to have a little tended to obscure the true position of the findings of fact in this case—a disposition on the part of the learned judge to treat himself and the two assessors as together forming the Court, speaking, as he does, of this judgment as a judgment of the majority of the Court. It is material in my view to remember that this is not the case, for this reason—that otherwise the Admiralty judge may be tempted to leave to the assessors a question of fact not involving nautical skill. And when I find the learned judge saying, as I read here, that "in the opinion of the majority of the Court she was closer than three to four ship's lengths"—which is a question of fact dependent mainly, if not wholly on the truth of the evidence—and "one member of the Court is of opinion that you must take her own evidence as to the distance"—which is partly fact and partly law—I confess I think it is important to point out that it ought to be his judgment, unaffected in questions of credibility of evidence by the opinion of those of whose nautical skill upon all questions of seamanship he has the great advantage at the trial. Certainly I am not inclined to dissent from his conclusion. I think he has intended to find, as the Lord Chief Justice pointed out, that the officer who was responsible on board the *Koning Willem II.* did give the order to reverse the very first moment he saw the masthead lights changing their position. I was myself much impressed at first by an apparently conflicting statement made by that same witness, but when I came, as I did, to read afterwards the words that followed, the difficulty that evidence had created disappeared. I will just refer to them. The words that created the difficulty were: "You kept your course and speed until she was within about how close from you?—About a ship's length—one and a half—something like that." That certainly was a position of greater nearness than existed at the period at which he first saw that, owing to the alteration in the position of the masthead lights, the other vessel was altering her course. Then comes this: "Then you reverse your engines?—Yes. How long do you think they were reversing before the collision?—About half a minute." So, reading that together, you have got the statement by this officer that "I gave the order to reverse half a minute before the collision." The distance separating the two vessels could not therefore have been one and a half lengths when the order was given, because the two vessels, travelling as they did, making full allowance for the alteration on the part of the *Isle of Caldy*, would have been in collision far more quickly than in half a minute if there was no order given to reverse before. Reading the evidence of that witness fairly together, I do not think he can have intended to mean that the distance at the time he gave the order was about a ship's length. He was evidently a man accurate about time; eight seconds was a computation he made with regard to one portion of the proceedings. If he acted half a minute before the collision, I should infer that he acted really at the earlier period when the lights were first seen coming into line, as you would have inferred from the passage which has been read by the Lord Chief Justice. As I understand the facts, this was not a case in which one of two vessels gets on to the starboard bow of another, the courses being nearly opposite, and, instead of broadening, remains on the same bearing for a material time or actually narrows. As I understand the evidence, three-quarters of a point on the starboard bow of the *Koning Willem II.* was a position which I may call the maximum position attained by the *Isle of Caldy*, and it is deviating from that maximum position, reached by a fine but still apparently steady starboard helm, that she suddenly altered in the way she did. Until the moment, as I read the evidence, at which these lights were then seen to alter by coming into line, if you had asked the officer of the *Koning Willem II.*, "What has that other vessel done," he would have said, "She has been getting more on my starboard bow, and now (at the moment just before she was seen to be altering) she has got three-quarters of a point." Our assessors say that the change in the position of the masthead lights would be the first thing that indicated the duty of a seaman to change either course or speed. This was not the case of a vessel remaining on the same bearing, or visibly narrowing on the starboard bow as the vessels approached each other; but of a vessel attaining gradually a position, you may call it, fine upon the starboard bow, but still a position which would have been a position of safety had the helm not been altered, and which the officer in charge of the *Koning Willem II.* was justified in expecting would not be altered, as it was, into a position of danger by the improper porting of the *Isle of Caldy*. I shall certainly not differ from the view taken by the learned judge in the Court below, as to the time when the danger became apparent so as to call for action on board that vessel, a view which I think the evidence justifies.

Appeal dismissed.

Solicitors for appellants (plaintiffs), the owners of the *Isle of Caldy*, and others: *W. W. Wynne & Sons, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for respondents (defendants), the owners of the *Koning Willem II.*: *Clarkson, Greenwell & Co.*

T. L. M.

C. A.

1907

Oct. 30.

[IN THE COURT OF APPEAL.]

THE UNIVERSITY COLLEGE OF NORTH WALES *v.* TAYLOR.

Probate—Incorporation—Will and Unexecuted Memorandum.

In order to admit parol evidence for the purpose of identifying a document referred to in a will and intended to be incorporated, the description of the document in the will must definitely refer to an existing document. If the will can be construed as referring to an existing or future document, parol evidence is not admissible.

This was an appeal from the decision of the President refusing to revoke the probate, which had been granted in common form, of a will dated June 27, 1905, of John Eyton Williams, who died on July 15, 1905, and a document dated March 12, 1905, alleged to be incorporated with the will. The case is reported in the Court below (1), where the facts are fully stated, and it is thought that the following summary will be sufficient to make the arguments and judgments intelligible.

The testator, among other legacies, gave "10,000*l.* to the trustees for the University of Wales upon trust to invest the same and apply the income arising from such investments in founding in it new scholarships and prizes in my name to be held upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto"; and he directed his executors to communicate to the said university his bequest and the terms and conditions thereof, and the rules and regulations relating thereto; and if the university should decline or refuse to accept the bequest upon the said terms and conditions and subject to the said rules and regulations, he declared that the said legacy and every other bequest in his will to the university should be void, and gave the same to the trustees of the University College of North Wales at Bangor upon the same trusts and under the same conditions.

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(1) [1907] P. 228.

He then gave a legacy of 10,000*l.* to the University College of North Wales at Bangor in exactly the same terms as the first legacy, with a like gift over to the University of Wales if the college did not accept his terms and conditions. The testator gave his residuary estate to the said university and college in equal shares upon the same trusts, and subject to the same conditions, as the legacies. Among the testator's papers was found a document in his own handwriting, dated March 12, 1905, of which the material parts were as follows :—

"To the Executors of my Will:

"Dear Friends,

"I desire to append a few observations expressing my views and opinions with respect to the bequests I have made to the 'University of Wales' and the 'University College of North Wales,' Bangor."

The testator then stated at some length his desire to assist the cause of education in Wales; and continued: "But I feel it my solemn duty to attach two conditions of a theological nature which shall be absolutely obligatory on every winner of a prize in any competition under this disposition as the foundation of the whole scheme viz. :—

"1. 'The belief in the existence of a Supreme Being, The Almighty All-wise and All-merciful God, Creator of Heaven and Earth, and all things therein, Supreme Ruler and Governor of the Universe';

"And 2. 'The acceptance and belief in the tenets and principles of the Protestant faith.'"

Then followed conditions as to candidates being of Welsh birth and other matters.

The will and document were both admitted to probate, and this suit was commenced in the Probate Division for revocation of the probate by the said university college and university as plaintiffs against the testator's executors and the beneficiaries under his will as defendants.

The President admitted parol evidence to identify the document referred to in the will. The evidence shewed that the document was written out by the testator shortly

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after the execution of an earlier will executed in March, in which the testator had given legacies of 10,000*l.* each to the university and college, but that it was produced at interviews of the testator with his solicitor, at which instructions were given for the last will, and that the last will was prepared on the footing that this document was the one referred to. On this evidence the President held that the document was rightly admitted to probate. The University College of North Wales appealed.

Upjohn, K.C., *Duke, K.C.*, and *Prior*, for the appellant. The document in this case is not sufficiently described in the will to justify the admission of parol evidence to identify it. The rule is clearly laid down by Lord Eldon in *Smart* v. *Prujean* (1): "The rule of law is that an instrument, properly attested, in order to incorporate another instrument, not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated; in such a way that the Court can be under no mistake." The matter was much discussed in *Allen* v. *Maddock* (2), and Lord Kingsdown, in delivering the judgment of the Privy Council, adopted Lord Eldon's statement of the law, but added, "For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded."

The same rule is repeated in Lord Herschell's judgment in *Singleton* v. *Tomlinson.* (3) No argument can be derived from the fact that the testator says the terms "are contained" in a memorandum, for words of present time in a will are the same as words of future time: see *In re Bayliss's Trust.* (4) The true construction of the will is that the testator was reserving power to make different memoranda when he chose. The word "any" shews that he was not referring to a particular document then in existence.

Sir D. Brynmor Jones and *J. G. Wood*, for the University

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(1) (1801) 6 Ves. 560, 565.

(2) (1858) 11 Moo. P. C. 427, 444.

(3) (1878) 3 App. Cas. 404, 414.

(4) (1849) 17 Sim. 178.

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of Wales (who had not appealed), adopted the appellant's argument.

Montague Lush, K.C., and *Middleton*, for the executors. Parol evidence is admissible to put the Court in the position of the testator. Evidence of the surrounding circumstances is necessary in order to construe a will or any other document: *In re Kilvert's Trusts.* (1) The evidence of the solicitor shews that this document was in existence when the testator signed his will, and that he meant to refer to it. He probably intended to keep a power to alter the memorandum or make another. If the testator had done so the substituted document would have been bad, but he intended the document which was in existence to stand unless he altered it. He did not alter it, and the document was rightly admitted to probate.

Barnard, K.C., and *Harold Morris*, for the beneficiaries, argued on the same lines.

Rowlatt, for the Attorney-General.

Cozens-Hardy, M.R. This is an appeal from the judgment of the President of the Probate Division, who has admitted to probate a certain memorandum in the handwriting of the testator, which it was said was referred to in the will in such a manner that it is entitled to incorporation. In considering this case our first duty is to construe the will, for a will may be so phrased as, on the one hand, to exclude the possibility of the admissibility of any parol evidence, and, on the other hand, may be so phrased as to admit the possibility of the admissibility of parol evidence. The material bequests in question here are sufficiently set out in this one clause which I will now deal with. There is a gift of 10,000*l.* to the trustees for the time being of the University of Wales, and a trust "to invest and apply the income of such investments" [his Lordship read the words] "as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto." Then there is a similar bequest of 10,000*l.* to the University College of North Wales in identical language, not referring to the said memorandum or the same memorandum, but again specifying "in any memorandum amongst my papers written or signed by me relating thereto," and the residue of the estate is given, half to the University of Wales and half to the University College of North Wales, upon the same trusts, and in the same manner, and under and subject to the same conditions as are declared concerning the two legacies.

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(1) (1871) L. R. 7 Ch. 170.

Now it is admitted, I think—and if it is not admitted it could not really be disputed—that the respondents must fail if, according to the true construction of the will, the 10,000*l.* is to be held as if the testator had said "upon such trusts and conditions, and subject to such rules and regulations, as shall be found contained and specified in any existing or future memorandum amongst my papers written or signed by me." That, in my view, is the true meaning and construction of this gift. I cannot read it as meaning "upon the trusts and upon the terms specified in any one existing document unless and until I may alter it by some other document which I may execute at some future time." Whether such a gift would or would not be valid I do not pause to consider, but I am entirely unable to accept that view of the construction. The word "any" pre-supposes the possibility of more than one, and the fact that the second gift does not necessarily as a matter of construction refer to the same memorandum as is mentioned in the first gift—although the document which is admitted to probate relates to both—greatly assists and helps this view. Now, if that be the construction, is it open to us to admit parol evidence? I think it is not. It seems to me that what was said by Lord Eldon in *Smart* v. *Prujean* (1), and what was said by Lord Kingsdown in delivering judgment in *Allen* v. *Maddock* (2) is conclusive on this point. Lord Eldon in *Smart* v. *Prujean* (1) says: "The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated in such a way that the Court can be under no mistake." In the latter part of the same judgment he says there is another ground on which he declined to admit the papers in that case: "Not whether the same envelope or superscription is evidence that the testator meant, these should be the papers referred to; but whether I must of necessity collect from the contents of the will that they should be considered the same. The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will these two papers are the papers referred to? Suppose several other papers were found with them, could I say that this will would have enabled me to select these two as the only papers referred to?" Then in *Allen* v. *Maddock* (1), which, no doubt, is the leading authority on this branch of the law, Lord Kingsdown, in giving advice to the Privy Council, says (2): "A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular." Applying these principles laid down by such great authorities, it does seem to me that, on the construction of this will, parol evidence was not admissible.

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(1) 6 Ves. 560, 565.

(2) 11 Moo. P. C. 427, 454.

But, having regard to the importance and interest of the case, we thought it right de bene esse to listen to what the parol evidence was; and, speaking for myself, if I had any doubt before I think that if that parol evidence had been considered it would have made it still more impossible to support the view that this memorandum could have been incorporated in the will, because it is quite plain that the testator's wish and intent was that his trusts should be found, not merely in the then existing memorandum which was before him, but in some subsequent future memorandum or memoranda which he contemplated and intended to execute, and which he meant to incorporate. With the greatest possible respect to the learned President, I am unable to agree in the application of the principles of law which he has laid down to the construction of this particular will, and in my view the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. As a pure question of construction I think that the words of this will do

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(1) 11 Moo. P. C. 427, 454.

(2) Ibid. at p. 454.

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Fletcher Moulton L.J.

not purport to refer to an existing document. They seem to have been chosen to express the intention of the testator at some future time or times to draw up one or more memoranda as to the terms and conditions under which the legacies in his will were to be enjoyed by the institution, and, that being so, parol evidence was not admissible at all. But for reasons that the Master of the Rolls has given we have listened to parol evidence, and in my opinion it supports what I consider to be the natural interpretation of the language used.

The respondents to this appeal do not contest that the testator intended to reserve to himself the power of making future memoranda setting forth the conditions under which these legacies were to be enjoyed. But they suggest that because there was one document in existence at the date of the will which answers the description in the will that document is entitled to probate although future documents of the same kind would not be. I should require a good deal of persuasion to induce me to accept that doctrine, but before they can avail themselves of it they must prove that a document precisely answering the description was then in existence. Now, speaking for myself alone, it appears to me that the document they tender is not a document which does answer that description, or which, if I may trust the parol evidence, the testator meant should answer that description, or should be included in the documents to which the words of his will refer. It is a letter directed to the executors of a former will, relating to the conditions under which the stocks and shares are to be held which are to be bought under a bequest in that will, and there is no proof that it was the intention of the testator that the document purporting to refer to the legacies under that previous will should be a document included within the words used in his last will. I have no doubt that he intended that the memoranda to be drawn up should in substance, or should to a large extent, agree with that already existing document, but there seems to me to be nothing here which would justify the Court in considering that there is any inclusion of that document in the class of documents to which he refers. I am therefore of opinion, both on the facts of the case, if the facts be gone into, and the words of the will, that this will alone was properly admitted to probate.

Farwell L.J. I agree. There is really no dispute about the law; it is a mere question of the construction of the will. It is well settled that in order to incorporate a document of this nature the will must necessarily refer to a particular specified paper then in existence. Now, when I construe the words of the will, I find the testator dealing with the separate legacies of 10,000*l.* each and giving them to trustees on such terms and conditions, and subject to such rules and regulations, "as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto." In order to identify it one would have expected him to have said "the said memorandum hereinbefore referred to." Apart from that, reading the words fairly I find it impossible to doubt that the words "as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto" do not refer to any particular document, but refer to any number of documents which may or may not answer the description of being written, or in the alternative signed, and which may or may not be in existence. So far as regards the word "are" is concerned, it is well settled that in wills it may well not point to futurity, and I cannot doubt that the testator in using those words has intended to reserve to himself the right to declare from time to time the rules and regulations and the trusts which he desires to apply to his gift. If this is decided to be the true construction of the words, it is obvious that parol evidence cannot be admitted in order to contradict that which has already been held to be the meaning of the words. I am not sure that I have altogether followed the grounds on which the learned President did admit it; but we have heard it de bene esse, and I can only say that the impression produced on my mind is this, that it is exceedingly fortunate that the rule is as it is, because we should be defeating the intention of the testator in this particular case if we gave effect to a memorandum which, on the evidence if it were admissible, he did not intend to be final but intended to alter. The result is that, with all respect to the learned

President, I cannot agree with his construction, and therefore the appeal must be allowed.

The costs of all parties were ordered to be paid out of the residue.

Appeal allowed.

Solicitors for appellants: *Lloyd George, Roberts & Co., for J. Glynne Jones, Bangor.*

Solicitors for executors: *Chester, Broome & Griffithes, for Jolliffe & Jolliffe, Chester.*

Solicitors for next of kin: *Kennedy, Ponsonby & Ryde.*

Solicitors for University of Wales: *Faithfull & Owen.*

Solicitors for the Attorney-General: *The Treasury Solicitor.*

J. R. B.

1907
Dec. 3.

[DIVISIONAL COURT.]

THE TURQUOISE.

Ship — Collision — Fairway — Swansea New Cut — Lights — Regulations for Preventing Collisions at Sea, 1897, *art.* 11.

A vessel lying moored at night, outside another vessel, at the customary place for trawlers loading ice, viz., the Fish Wharf on the east side of the New Cut, Swansea Harbour, is not "at anchor" within the meaning of the first paragraph of art. 11 of the regulations for preventing collisions at sea, and, therefore, need not carry a white light; nor, at low water, is she "aground in or near a fairway" within the meaning of the same regulations, and, therefore, need not carry the two red lights mentioned in the last paragraph of those regulations.

APPEAL by defendants, the owners of the steamship *Turquoise*, against a decision of the judge of the Swansea County Court holding their vessel alone to blame for a collision with the steam trawler *Weymouth*, owned by the plaintiffs.

The case is reported on the question whether art. 11 of the regulations for preventing collisions at sea, 1897 (1), applies to a vessel lying moored outside another vessel at the Fish Wharf, in the New Cut, Swansea Harbour.

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(1) Art. 11: "A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to shew a

On June 23, 1907, in fine weather, about 2.30 A.M. and about an hour before high water, the steam trawler *Weymouth*—of thirty-four tons register, 110 feet long, and drawing 13 ft. 6 in. aft, owned by the plaintiffs, the Western Steam Trawling Company, Limited, of Bristol—was lying moored stem and stern, outside the trawler *Devon*, in the customary place in the river Tawe for trawlers loading ice—viz., just below the knuckle at the north end of the Fish Wharf, off the ice factory berth on the east side of the entrance channel, and nearly opposite, but a little south of, the half-tide basin of the North Dock, Swansea Harbour—when she was run into, damaged, and cast adrift by the *Turquoise*, of London, a steamship of 1343 tons register, owned by the defendants, and proceeding up the New Cut in the course of a voyage in water ballast from London to the Central Dry Dock, Swansea.

At the trial, on July 3, it appeared that the *Weymouth* had been alongside the wharf when taking in ice, but had shifted outside the *Devon* preparatory to going to sea, and the acts of negligence charged by her owners, the plaintiffs, against the defendants were that the *Turquoise* "failed to keep a proper look-out, failed to keep clear of the *Weymouth*, neglected to wait for an outcoming steamer, and, instead of doing so, left her fair course in the river, and canted to starboard in order to clear her, and in so doing collided with the *Weymouth*, which was moored at her proper berth."

On the other hand, the defendants charged the *Weymouth* with "carrying no light in breach of art. 11 of the regulations for preventing collisions at sea," and that she "was moored alongside another vessel in the fairway of the river and New Cut in breach of s. 80 of the Swansea Harbour Trust Act, 1854, and rule 8 of the rules and regulations made by the harbour trustees in conformity with s. 52 of the Harbours, Docks, and

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clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile.

. . . . .

"A vessel aground in or near a fairway shall carry the above light . . . . and the two red lights prescribed by article 4 (*a*)."

Piers Clauses Act, 1847," and further that "the *Weymouth* had no tide watch on deck in breach of rule 16 of the last-named rules and regulations."

The learned county court judge, who was assisted by two nautical assessors, in giving judgment on July 30 in favour of the plaintiffs, the owners of the *Weymouth*, and directing a reference to the registrar to assess the amount of the damage, added a supplementary note that "I was of opinion that the pilot of the *Turquoise* was to blame; that he should have stopped down channel when he first heard the signal that a vessel (the steamship *Bothnia*) was coming astern from the North Dock basin, and should have waited till the steamer coming out had been swung completely round, so as to leave the channel free, and particularly that he should have gone astern when the mate gave the first warning to do so, instead of trying to pass her when she was lying broadside across more than half of the channel, especially when he knew that vessels had often been moored two or three deep along the Fish Wharf, and that lights were never shewn by them when so moored. I came also to the conclusion that the *Weymouth* could not be held to blame for not exhibiting a light, as lights have never been exhibited by vessels moored alongside the Fish Wharf, even when moored three or four deep, and this was always known to, and never complained of by, the dock authorities or pilots.

"I was also of opinion that the temporary absence below of the mate of the *Weymouth* did not contribute to the accident, as the mate of the *Turquoise* had seen the *Weymouth*, and had in time warned the pilot to go astern, and his warning had not been attended to."

1907. Dec. 3. *Lewis Noad*, for the appellants (defendants), owners of the *Turquoise*. The finding of the learned judge in the Court below, on the facts, that the *Turquoise* was to blame, is not disputed; but it is contended that, as matter of law, the *Weymouth* was also to blame, for, though it was long before sunrise, she was not exhibiting a white light, and in addition, when she was aground, two red lights, under art. 11 of the regulations for preventing collisions at sea.

"At anchor" is opposed to "under way" (see the first paragraph of the preliminary article to the regulations for preventing collisions at sea), so that a vessel, fast to an object which is itself fast to the ground, is "at anchor" and is required to exhibit a white light. This will include a vessel alongside another vessel or moored alongside a quay, or fast to a dolphin, or to any object on the shore, for she would, according to Marsden's Collisions at Sea, 5th ed. (1904), p. 362, be "at anchor" within the meaning of art. 11, and, in support of the view that a vessel, whilst moored to a wharf, should shew a light, he cites an American case: *The Kennebec.* (1)

The question whether a vessel is in the "fairway" must be a matter of fact in each particular case. Here, according to the evidence, the combined width of the two vessels and their fenders brought the *Weymouth* some forty-five feet from the side of the wharf. She was, therefore, in the navigable part of the channel, that is to say, she was "in or near a fairway"; and, therefore, when, at low water, she grounded, she was bound to shew the prescribed lights. In *The Blue Bell* (2) "fairway" was defined to mean "a clear passage way by water," and, in that case, the barge found to blame for not ringing her bell in fog was "in a part of the river (Thames) where it is safe for vessels of moderate draught to navigate." If the *Weymouth* was bound, as it is submitted she was, to shew lights when aground, she could not be justified in not exhibiting any light when the tide rose and vessels would be navigating in her vicinity. In the Thames the *Weymouth* would have had to carry a light, for, by rule 30 of the Thames By-laws, "Where masted vessels are lying in tiers, the outermost off shore masted vessel only of each tier shall carry the riding light." Apart from the question of lights, the *Weymouth* should not have been made fast where she was, for, by art. 8 of the by-laws of the Swansea Harbour Trustees, "No vessel is to be moored or made fast or laid aground in the fairway of the river or New Cut," which must be taken to mean "in the fairway of the" New Cut. In that position the vessel was an obstruction to the navigation within the meaning of s. 80 of the Swansea Harbour Trust Act, 1854.

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(1) (1901) 108 Fed. Rep. 300.

(2) [1895] P. 242.

[The cases of *The St. Aubin* (1) and *The Titan, The Rambler* (2) were referred to.]

Aspinall, K.C., and *Meager*, for the respondents (plaintiffs), owners of the *Weymouth*, were not called upon.

BUCKNILL J. The point raised in this case is one of law only, for it is admitted by counsel for the appellants that there is no appeal upon the facts, but I will refer to the facts for a moment to see what was in the judge's mind.

The up-coming ship, the *Turquoise*, was being navigated by a pilot who disregarded all the reports of the existence of the *Bothnia* and the *Weymouth*, and he tried to cut in between the two. Therefore the learned judge properly found that the navigation of the up-coming ship was negligent.

The point of law is this, that the *Weymouth*, lying second out at the Fish Wharf, was negligent in not having exhibited a white light and two red lights, or, if she ought not to have exhibited those lights, in not exhibiting a white light as an anchor light. It is said that she ought to have exhibited the white light and two red lights, because she was, under art. 11, a vessel "aground in or near a fairway," and that if not that she was a vessel "at anchor," and ought to have carried an anchor light. We think she was neither the one nor the other. The place where she was lying was part of the New Cut, a place where steam trawlers are allowed, and directed, and have to go in the course of discharging their fish cargoes, and therefore this vessel was properly moored or made fast at this place, where business of that nature is carried on. Was she made fast in a fairway? We are of opinion that she was not made fast in a fairway, but in an artificial place called the New Cut, on a mud bank, on which there was no water during part of the tide. That, however, does not necessarily conclude the case, but when we look at the by-laws of the Swansea Harbour Trustees we find that under art. 8 "No vessel is to be moored, or made fast, or laid aground, in the fairway of the river or New Cut, or in the entrance to the half-tide basins or locks." We agree with counsel for the appellants that that ought to be read "or in the fairway of the New Cut"; and

(1) [1907] P. 60.

(2) (1906) 10 Asp. M. L. C. 350.

it is manifest that, in the opinion of the authorities, this vessel was not moored in the fairway of the New Cut. We have asked the Elder Brethren whether in their opinion this vessel was in the fairway of the New Cut, and their opinion is that she was not moored in the fairway of the New Cut. That being so, in our opinion the *Weymouth* was not bound to carry these two red lights and a white light. Also, in our opinion, she was not at anchor under the article of the regulations for the prevention of collisions at sea to which we have been referred. Therefore the appeal must be dismissed.

Bargrave Deane J. The whole question is: Was the *Weymouth* in the fairway? and it is clear that, if she had been, she would have been moved at once by the harbour authorities. The harbour authorities directed her to go there, and that makes it clear that, in the opinion of those who know the place, she was not in the fairway. The word "fairway" did not apply to that part of the river at all.

Appeal dismissed.

Solicitors for appellants (defendants): *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for respondents (plaintiffs): *Holman, Birdwood & Co., for Edward Gerrish, Harris & Co., Bristol.*

T. L. M.

1907
Nov. 29, 30.

THE SUEVIC.

Admiralty—Salvage—Danger to Life.

In an action for salvage of life alone, it appeared that four tugs put out from Falmouth at night to render assistance to a large British steamship stranded off the Lizard, making signals of distress, and having on board nearly 400 passengers, 140 crew, and a valuable general cargo.

Owing to the fog prevailing, and the strong wind and heavy ground swell, caution was necessary in getting to the vessel, and, on account of the rocks, the tugs were unable to approach close to her; but, at the request of the local lifeboats, which had already reached the vessel with the object of saving life, they took these boats in tow, and so enabled them, in the course of several trips, to land in safety the whole of the passengers and crew. Part of the vessel and part of her cargo were subsequently salved by other salvors:—

Held by Bucknill J., that the owners, masters, and crews of the tugs were entitled to an award of 800*l*., for by expediting, at some risk to themselves, the transfer of the passengers from the ship to the shore, the tugs had assisted in saving life from actual, or serious apprehension of, danger.

Action of Life Salvage.

The plaintiffs were the Falmouth Towage Company, Limited, owners of the steam-tug *Triton*, and the master and crew thereof, and the owners, master, and crew of the steam-tug *Victor*, and the owners, masters, and crews of the steam-tugs *Marion* and *Briton*.

The defendants were the owners of the steamship *Suevic*, and the owners of her cargo and freight.

The case is reported on the question of the principle upon which the Court acts in decreeing salvage for the preservation of life alone.

On March 17, 1907, about 10.30 p.m., the weather being foggy with rain, with a strong breeze from the W.S.W. and a heavy swell, the steel twin-screw steamship *Suevic*, belonging to the port of Liverpool, 550 feet in length, and of 12,500 tons gross register, fitted with quadruple expansion engines of 641 horse-power nominal, and manned by a crew of 142 hands all told, struck on the rocks a little south-west of the Lizard. The tide was running ebb in shore, and the ship lay on the rocks heading about E. by N. with her forepart aground and 370 feet aft of that afloat in ten fathoms of water. She was at the time in the White Star Line on a voyage from Australia to London via Plymouth with a full general cargo, 382 passengers, and one stowaway. The value of the vessel was 55,000*l.*, that of her cargo and freight 210,000*l.*, together 265,000*l.*

The *Triton* is a steel screw tug of 173 tons gross register, with triple expansion engines of 682 horse-power indicated, and manned by a crew of eight hands all told. Her value is 6500*l.* The *Victor* is a steel screw tug of 153 tons gross register, with triple expansion engines of 600 horse-power indicated, and manned by a crew of six hands all told. Her value is 6000*l.* The *Marion* is a steel screw tug of 46 tons gross register, with engines of 175 horse-power indicated, and manned by a crew of four hands all told. Her value is 2250*l.* The *Briton* is a wooden tug of 40·12 tons gross register, with compound surface condensing engines of 210 horse-power indicated, and manned by a crew of four hands all told. Her value is 2000*l.* All these tugs belong to Falmouth, and are kept ready day and night to render assistance.

On the news of the stranding of the steamship reaching Falmouth, the *Triton* and the *Victor* left that port about midnight, and were followed about 3 A.M. the next morning (March 18) by the *Briton* and the *Marion.* Owing to the fog and high sea, caution was required in feeling their way, and about 3 A.M. the *Triton* reached the steamship, the *Victor* at about 4.45, the *Briton* a quarter of an hour later, and the *Marion* at about 5.15 A.M. After some time the attention of those on board the *Triton* was attracted by a distress signal burnt by the Cadgwith lifeboat, which, together with other local lifeboats, had been standing by the steamship. With difficulty and some risk the *Triton* took the lifeboat in tow and towed her to Cadgwith, a distance of between two and three miles, where the passengers (about forty-two) were landed, and the lifeboat towed back to the *Suevic*, reloaded with about sixty passengers, who were all landed, and the lifeboat towed back to the ship. After some time a large number of passengers and some of the crew were put on board the tug by the Cadgwith and Lizard lifeboats, together with specie to the amount of between 3000*l.* and 4000*l.*, and taken to Falmouth. The *Victor* took the Lizard lifeboat in tow, and her full complement of passengers were safely landed at

Cadgwith, and the lifeboat was towed back again to the *Suevic*, when she was again filled with passengers, and a second time taken in tow to Cadgwith and back to the ship. The tug subsequently took on board twenty-seven members of the crew, and in towing two of the ship's lifeboats had some trouble owing to the ropes fouling the propeller; but the lifeboats were transferred to another tug, and the *Victor*, proceeding to Cadgwith, took on board some sixty passengers and crew and landed them at Falmouth. The *Briton* on her way down to the stranded vessel picked up the Coverack lifeboat and towed her to the ship, and after the lifeboat had been filled with women and children towed her to Cadgwith, where the passengers were landed, and the lifeboat was towed back to the ship, filled again with passengers, and towed round the Stag rocks safe on her way to Cadgwith, the *Briton* then picking up three lifeboats belonging to the *Suevic* and towing them towards Falmouth. The *Marion*, after towing the Mullion lifeboat to Mullion under the impression that all the passengers were landed, returned to the *Suevic* and took 126 passengers from her lifeboats, and conveyed them to Falmouth.

About two-thirds of the *Suevic* and nearly 80 per cent. of her cargo were subsequently salved by other salvors.

By their defence the defendants denied that any salvage services in saving life from the *Suevic* had been rendered by the four tugs, and they alleged that between midnight and daylight the ship's own lifeboats, with the assistance of the Lizard, Cadgwith, Coverack, and Port Leven lifeboats, had landed a good many of the passengers in safety; that when the tugs arrived about daylight, on March 18, the weather was moderating and the fog lifting; and the defendants, whilst denying all liability, tendered and paid into court, as sufficient to satisfy any claim of the plaintiffs, 420*l.*, divided as follows: *Victor*, 125*l.*; *Triton*, 150*l.*; *Briton*, 80*l.*; and *Marion*, 65*l.*

1907. Nov. 29, 30. The case was tried by Bucknill J. with the assistance of two of the Elder Brethren of the Trinity House.

Laing, K.C., and *H. C. S. Dumas*, for the plaintiffs, the Falmouth Towage Company, Limited, and others. The Court will regard this as a very meritorious case of saving a large number of lives from a British ship in British waters. In rendering the services all the four tugs were exposed to considerable risk, for the weather was bad, there was a high sea, a heavy swell, and, for a great part of the time, a thick fog prevailed, so that the navigation amongst the rocks was dangerous. The passengers were rescued from a position of great peril, and without the services of the tugs the lifeboats could not have performed the work. The tender is wholly inadequate.

[The cases of *The Cargo ex Schiller* (1) and *The Cargo ex Sarpedon* (2) were referred to.]

Aspinall, K.C., and *John B. Aspinall*, for the owners of the *Suevic*, her cargo and freight. The four local lifeboats could have saved all hands without the aid of the tugs. The only use of the tugs was to expedite the service performed by the lifeboats. None of the tugs ran any risk in towing or otherwise, and none were ever alongside or near the *Suevic*. They all lay at a safe distance. The wind and sea were going down with daylight, and the stranded vessel was well equipped with twelve lifeboats, which could have carried over 100 more people than there were on board, so that no lives were in danger. The tugs were not directly employed by the ship, but were engaged by the lifeboats to tow them. Assuming that it is a case of salvage, the tender is adequate.

[The case of *The Fusilier* (3) was referred to.]

Laing, K.C., in reply. The suggestion that the tugs were not invited to come out to the assistance of the ship is negatived by the statement in the log that distress signals were fired.

[The observations of Gorell Barnes J. in *The Glengyle* (4)—as to the function of the Court to encourage the maintenance of powerful and efficient steam-tugs around our coasts—were referred to.]

BUCKNILL J. Cases of life salvage alone are of rare occurrence in this Court, and therefore it is necessary carefully to consider the principles upon which a salvage award may be made in such a case as this. I apprehend that it will be accurate to say that

(1) (1877) 2 P. D. 145.

(2) (1877) 3 P. D. 28.

(3) (1865) Br. & L. 341.

(4) [1898] P. 97.

the principle which lies at the bottom of life salvage is that there must, in the first instance, be actual danger to the persons whose lives have been salved, or the apprehension of danger, and that seems to me to cover the whole ground. If there is no danger, or anything like danger, there is nothing to be saved from. The persons are in safety on the ship, and may stay there until the weather becomes fine and then go ashore. When, however, there is danger in fact to those persons, or serious apprehension of such danger, and they are saved from that, it seems to me that the persons saving them are entitled to salvage award. There may be many other considerations, but that seems to me to be the principle which lies at the bottom of the matter.

The facts in this case are simple. This splendid ship—the master has said, in a manly way, through an error of judgment, about which I know nothing, and with which I have no concern—this splendid ship, in foggy weather, got ashore at a place which may be taken to be to the north and west of the Carligga Rock, in what is called on the chart Lead Pool, and the log may be read as representing a fair account of what happened. It is a log which appears to have been very well kept, and what it says is this: "March 17, 10.15, sighted loom of Lizard light. 10.27, ship took ground, stopped engines. 10.33, astern full, both. 10.38, stop starboard. 10.40, stop both. All hands employed clearing away boats, firing distress signals and landing passengers until midnight. Midnight, strong wind, high ground swell, misty over land. Monday, March 18, proceeding landing passengers in ship's boats and shore lifeboats, assisted by tugs. 4 o'clock, strong wind, high ground swell, misty. 8 o'clock, similar weather. 11 o'clock (about), all passengers landed, tug *Triton* taking last and laying off ship." That states in a few words what was done on this occasion.

The four tugboats, *Triton*, *Victor*, *Marion* and *Briton*, all hail from Falmouth, and their united crews amounted to twenty-two hands all told. To a certain extent I have to take into consideration the value of the salving property, and that came altogether to 16,750*l.*

Now, the weather being, as I find it to have been, foggy or misty, so that the light could not be seen, but only the loom of it in the water, and the wind of force about six, as I find, with a ground swell, these people very properly, as the master of the *Suevic* thought, had to be landed with the greatest expedition. If anything had happened and any life had been lost through these people not being sent ashore as quickly as possible, very severe and harsh things would have been spoken of the master and of the great company he serves, and one may be satisfied that the master duly appreciated the position. He did not accurately know where he was at first; he did not know what part of the ship was afloat and what not afloat; and if very bad weather had come on—and bad weather does very often come on there—that ship might have broken her back and there might have been great loss of life. Now, the weather being as it was, and the master having made distress signals, which I understand to have meant, "I want assistance from any person or persons who can give it," these tugs went out from Falmouth, and they went out with expedition and speed. These people know the land perfectly well, and all the dangers of the deep there—it is a rock-bound coast, and there are many sunken rocks and others which shew a little above water—but it would indeed be a hard and inaccurate thing to say that for any purpose whatever any of those tugs could have gone on that night, in that weather, and to such a spot as where the *Suevic* was ashore, without risk to themselves. People are fond, sometimes, of using the word "danger" only, but there is a great difference between danger and risk of danger; and just as the principle of salvage here applies to people on this ship who were either in danger or risk of danger, so a tug which is being navigated even by the most skilful navigator would be, I find, either in danger or risk of danger in going to the neighbourhood in which this ship was. I cannot accept the view put forward by the lifeboatmen, who have given their evidence with complete honesty, that there was no danger or risk of danger to these tugs. These fine fellows who go out in the lifeboats think nothing of these things. They face the biggest storm with the greatest bravery, and do not think this or that is dangerous which other people would be unable to think of without shivering. When they talk about there being no danger, I have to qualify it as a person administering justice, not because their view is unjust, but because they look upon danger in a different way to what other people do. I have to look upon danger as an ordinary person of ordinary intelligence, acting upon certain facts, and I find as a fact that there was risk of danger to all these tugs, more or less. I do not go so far as to say that they were ever in real danger—that might very well be in consequence of the skilful way in which they were handled—but I must state with confidence that there was risk of danger to all the tugs that went out on this particular occasion. Having found there was risk of danger—I will not go so far as to say there was absolute existing peril—the next thing is to consider what was done. The lifeboats did very valuable work. It was the view of the master of the *Suevic* that the passengers should be got ashore as soon as possible, otherwise he would not have done what he did, putting his own lifeboats into the water and sending them to Polpear. One of the boats was, in fact, stove in, and it is to be remarked that the other lifeboat which could have returned to the *Suevic* with the crew on board her after landing passengers did not return to the *Suevic*. That is a matter of some importance, because it throws a sidelight on this case, that is, that those in charge of the ship's lifeboat, having gone to Polpear and deposited there the women and children, took great care not to go back to their own ship. The shore lifeboats did their work as they ought to have done it. They took the passengers off, went out to the tugs, and the tugs towed them in and brought them back; and so I find as a fact that the work of the lifeboats was considerably expedited by the action of the tugs. I am not going to find that the lifeboats could not themselves have gone in and returned to the ship; but it would have been with considerable labour and much loss of time. So the work was done by the tugs with risk to themselves, and was performed expeditiously and skilfully and well. One of the tugboats picked up three of the ship's boats which got adrift. That work also involved risk of danger to the tug which did it.

There is another matter which must be referred to, to shew that the master thought the ship and the lives of the crew and himself were in danger, and that is that on the Monday he and the crew left the ship and remained by her on shore. I do not blame him. He had a duty to his crew and to himself. He knew perfectly well that his ship was not going to get off the rocks, and he did not know what might happen to her during the succeeding night. Therefore he took the proper course in going ashore with his crew and standing by. I think his conduct as a master was that which every competent master would have adopted, but it is strong evidence to shew that he was in great doubt as to what might happen at any moment to the people on board that he took himself and crew ashore after first sending all the passengers on shore. There is another matter. There was a red light shewn by the Cadgwith lifeboat to the *Triton*. I rather gather that would not have been shewn unless the lifeboat were in some corner and wanted assistance. All these facts tend to shew that there was existing danger or great apprehension of considerable danger to the persons taken ashore.

I have said enough to indicate that the tender cannot be accepted. I am not moved by the huge value of the ship and her cargo—to be so would be ridiculous—but I have to ask myself what, as a juryman, I ought to award in this case, and it must be more or less a guess—very much more a guess. I cannot have in mind the pecuniary value of the life of any one of these persons, and, therefore, it is a guess; but, taking into consideration the number of persons taken off with the assistance of the tugs, I think that I should award 800*l.* in all, which I divide as follows: *Triton*, 250*l.*; *Victor*, 250*l.*; *Briton*, 150*l.*; and *Marion*, 150*l.* I have not taken into consideration at all the question of the specie put on board the *Triton* by the Cadgwith and Lizard lifeboats. The salvage in respect of that might be agreed perhaps at 100*l.*

Tender overruled.

Solicitors for plaintiffs, the Falmouth Towage Company and others: *Pritchard & Sons.*

Solicitors for defendants, the owners of the *Suevic*, her cargo and freight: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

1908
Jan. 27.

THE READING.

Admiralty—Collision—Reference—Offer to agree Claim—Tender—Costs.

An action of damage by collision was settled on the terms that the plaintiffs should receive 60 per cent., and the defendants 40 per cent., of the amount of the damage sustained by their respective vessels; but, before the reference, the plaintiffs' solicitors wrote to the defendants' solicitors offering to agree the defendants' claim at 40 per cent. of 4500*l.* with interest. This offer the defendants declined to accept unless made in accordance with the rules as to tender. The investigation into the respective claims resulted in a small balance in favour of the plaintiffs being found due; but the registrar, in his report, although he reduced the defendants' claim below 4500*l.*, gave the defendants their costs of proving their claim on the ground that the plaintiffs' offer had not been followed up by the ordinary procedure in the case of a tender:—

Held by Bargrave Deane J., that the plaintiffs were entitled to the costs in respect of the proof of the defendants' claim subsequent to the offer by letter, as the word "tender" did not apply to the proposed agreement, which, if accepted, would have saved the expense attending the assessment of the defendants' claim.

MOTION IN OBJECTION TO REGISTRAR'S REPORT.

The appellants (plaintiffs) were the owners of the steamship *Cowrie*. The respondents (defendants) were the owners of the steamship *Reading*.

The case is reported on the question of the discretion to be exercised in respect of the costs of proving a cross-claim in the registry after an offer has been made to agree the claim at a figure which turns out to be more than is found to be due.

In an action of damage by collision the amount of the damage sustained by the plaintiffs and defendants respectively was referred by consent of the parties to the registrar, assisted by merchants, to assess the amounts upon the basis of an agreement whereby the plaintiffs were to receive 60 per cent., and the defendants 40 per cent., of the amount of the damage to their respective vessels.

Prior to the claims coming before the registrar for assessment, and with a view to avoid costs, the plaintiffs' solicitors, on November 6, 1907, addressed the following letter to the solicitors for the defendants:—

"With reference to our interview to-day we write again to say that our clients are willing to agree your clients' claim at 40 per cent. of 4500*l.*, together with interest if any. Failing your acceptance of this offer we shall bring this letter to the registrar's notice on the hearing of the reference upon the question of costs."

The solicitors for the defendants answered this letter on November 9 as follows:—

"Referring to your letter of the 6th inst., we beg to state that if you wish to make a tender in respect of our clients' claim we shall be prepared to accept your cheque on the same terms as if the money were paid into Court by way of tender. We cannot, however, treat your letter as if it were a tender."

To this the plaintiffs' solicitors replied on November 11:—

"We have your letter; but having regard to the fact that there are cross-claims in this case, and, therefore, presumably only a small balance will be due from one side to the other, we cannot very well make a tender; but we shall submit that, under the circumstances, our letter is quite sufficient for the purpose for which it is intended."

On December 6 the registrar made his report, by which the claim of the defendants, the owners of the *Reading*, amounting to 6600*l.*, was reduced to 4352*l.*, with the result that on the respective claims there was a balance due in favour of the plaintiffs, the owners of the *Cowrie*, of 250*l.*

With reference to costs the registrar reported that he was of opinion "that the plaintiffs and defendants are entitled to the costs of proving their respective claims," and, in support of this view, on December 8 gave as his reason that, "as regards the costs of the *Reading's* claim, they were allowed because no money or cheque was paid in respect of the tender, each claim is entirely separate, and, therefore, a tender should be either paid in cash or cheque as in an ordinary case."

A. D. Bateson, in support of the motion. The application is to vary the report of the registrar in so far as it gives the defendants, the owners of the *Reading*, their costs of proving their claim, the submission of the plaintiffs, the owners of the *Cowrie*, being that the Court, in the exercise of its discretion, under Order LXV., r. 1, will give the plaintiffs the costs of contesting the claim of the defendants, as and from November 9, when the defendants rejected the plaintiffs' offer to settle the defendants' claim for 40 per cent. of 4500*l.*

The result of the finding of the registrar is that the plaintiffs, the owners of the *Cowrie*, do not owe anything to the owners of the *Reading*, but that they, the defendants, owe the plaintiffs 250*l.*, for if both ships are guilty of negligence causing or contributing to the loss, each wrong-doer pays half the loss of the other, not as a cross-liability, but the balance—between a moiety of the loss of the one, and a moiety of the loss of the other—is due from the owner of the vessel which has sustained the smaller damage: see per Lord Blackburn in *The Khedive* (1); see also Marsden on Collisions at Sea, 5th ed. (1904), p. 128, citing *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.* (2)

As the plaintiffs succeeded in reducing the claim of the defendants below 4500*l.*, the only result of the litigation was to incur a serious amount of costs. The offer contained in the letter was quite sufficient, for a tender, in the ordinary sense, could not be made, as, if the money had been paid into Court, the defendants could have taken it out, and then paid over only the balance of 250*l.* subsequently ascertained to be due to the plaintiffs on the adjustment of the cross-claims. The cases in the Chancery Division of the High Court in respect of offers to avoid costs support the plaintiffs' contention: see *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (3); *Jenkins* v. *Hope.* (4)

If this were a case of tender, no doubt it would have to be made in regular form: *The Vrouw Margaretha* (5); *The Sovereign* (6); though, in the case of *The Hedwig* (7), a tender of 30*l.* in a salvage case was overruled by Dr. Lushington, and 50*l.* given, but costs were refused, because it appeared from the salvors' own affidavits that they had declined an offer of 80*l.* See also *The Nasmyth.* (1)

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(1) *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, (1882) 7 App. Cas. 795, at p. 822.

(2) (1889) 24 Q. B. D. 32; on appeal, (1890) ibid. 663.

(3) (1887) 36 Ch. D. 650; 57 L. T. (N.S.) 185.

(4) [1896] 1 Ch. 278.

(5) (1801) 4 C. Rob. 103, at p. 107.

(6) (1860) Lush. 85.

(7) (1853) 1 Spinks (E. & A.), 19.

Dawson Miller, contra. The Court will not interfere with the exercise of the discretion of the registrar in respect of these costs. He has reported that the plaintiffs ought to pay the costs incidental to the assessment of the claim of the *Reading*, for the plaintiffs did not follow up their offer by a payment into Court, and, therefore, did not comply with the formalities necessary to constitute a valid tender. All the cases as to tender cited on behalf of the plaintiffs shew that where a party relies upon a tender he must be in a position to prove that the regular procedure has been followed. In the present case the offer was, in the first instance, " without prejudice," and, though this proviso was withdrawn, the proceedings were throughout informal and by letter only. There was no payment into Court. The Admiralty practice as to the offer and acceptance of a tender is set out by Bruce J. in *The Mona* (2), and it is shewn that the procedure is unaffected by the rules governing the practice in other branches of the Court. If the money had been paid into Court, it could not have been taken out without an order of the judge: see Williams and Bruce's Admiralty Practice, 3rd ed. (1902), p. 408, note (*f*).

BARGRAVE DEANE J. In this case two ships came into collision and each suffered damage, and each party admitted liability. They agreed that there should be a reference to the registrar, and that one ship would pay 40 per cent. of the damage done to the other ship, and the other 60 per cent. of the damage done to the first. The case accordingly went to a reference. I need not go into figures. On behalf of the owners of one vessel, the *Cowrie*, a letter was written offering to agree the claim of the owners of the *Reading*, the other vessel, at 40 per cent. of 4500*l.* with interest. The answer to that letter was, " We are ready to accept your cheque "—putting it as an ordinary tender. The registrar, apparently, has treated it as an ordinary tender, and said it was incomplete because it was not accompanied with the payment into Court of the amount tendered.

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(1) (1885) 10 P. D. 41.

(2) [1894] P. 265, at pp. 268, 269.

I think the registrar is perfectly right to the extent that there was not an ordinary tender, but I do not think it was intended to be an ordinary tender. The question before the registrar was this: We have got to assess the damage caused to both ships. One vessel is claiming a large sum of money as damages caused to it. Is it to be said that the other side are not entitled to say, "We are willing to agree, to save the expense of a long inquiry, that the registrar shall assess these damages at the amount which you and I agree"? Is it to be said that no agreement may be arrived at before the registrar, short of an actual tender, with a view to saving the great costs of a reference? It seems to me that is a mistake, and I do not think the word "tender" applies to such an agreement, and, therefore, I do not think it comes within the law as to what should constitute a tender.

It seems to me that the appellant in this case has succeeded in shewing that he offered to agree the damages at a certain figure, He was entitled to do that, and if the offer had been accepted the whole of these costs would have been saved. It was not accepted, with the result that a lesser amount was arrived at by the registrar, and therefore I think the owners of the *Cowrie* are entitled to the costs thrown away by that reference.

It is not a tender. It is a question of Aye or No, has the person who offered to agree the damages at a fixed sum satisfied me that he made the offer for the purpose of saving the costs? I think he did do it for the purpose of saving costs, and I think he is entitled to the costs thrown away by the non-acceptance of his offer.

The report will be confirmed, with the variation that the plaintiffs, the owners of the *Cowrie*, will have the costs in respect of the claim of the defendants, the owners of the *Reading*, subsequent to the letter of November 9, 1907, and the plaintiffs will also have the costs of this motion.

Solicitors for appellants (plaintiffs), the owners of the *Cowrie*: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for respondents (defendants), the owners of the *Reading*: *Botterell & Roche.*

T. L. M.

[IN THE CONSISTORY COURT OF SOUTHWARK.]

1907 Nov. 30; Dec. 11.

THE VICAR AND CHURCHWARDENS OF WIMBLEDON v. EDEN.

In re ST. MARK'S, WIMBLEDON (CHAPEL OF EASE).

Ecclesiastical Law—Faculty—Faculty for Erection of Communion Table with Cross and Candlesticks—Chancel Steps—Retable—Dorsal and Side Hangings—Chapel of Ease—Vestry.

Circumstances in which a faculty was granted for placing a communion table, with a cross and candlesticks, in the chancel of a chapel of ease in substitution for the communion table originally placed there; the communion table to be so newly erected to be elevated on two steps above the floor of the church, and curtains to be fixed behind, and at the north and south ends of, the communion table, but not so as to prevent the minister, if so desirous, officiating in the Communion service at the north end of the table.

Observations as to vestry meetings in faculty cases.

THIS was a cause of faculty instituted on behalf of the Rev. James Allen Bell, the vicar, and John Fevrier and James Norman Myddleton, the churchwardens, of the parish of Wimbledon, in the county of Surrey and diocese of Southwark, for the purpose of obtaining the grant of a faculty for certain alterations in the church of St. Mark's, Wimbledon, a chapel of ease in the same parish, according to the architects' designs of Messrs. Thomas and Pomeroy annexed to the petition in the suit, in which petition one of the alterations proposed was described as follows: The erection of "a new altar with steps and ornaments." It further appeared from the petition that the costs of the proposed works would amount to 200*l.*, of which 130*l.* had been already promised; that the proposed works had been unanimously approved by the parishioners in vestry, a copy of their resolution, dated September 19, 1907, being annexed to the petition; that no pews held under faculty or by prescription would be affected; and that the Sunday services would not be interrupted by the proposed works.

An appearance as opponent was entered by Christopher Hammond Eden, a parishioner of the parish of Wimbledon; and he on October 21, 1907, brought in in person an act on petition, in which the following objections to the grant of the faculty proposed, so far as it related to the erection of "a new altar with steps and ornaments," were pleaded in substance (1) :—

That the resolution of vestry of September 19, 1907, mentioned in the petition was inadmissible in support of the petition, not having been summoned in the same way as the Easter vestry, copies of the notices convening the meeting not having been posted at all the churches in the parish of Wimbledon, and very few of the parishioners knew of the meeting.

That the present holy table of deal, which the specification of the proposed works states it is desired to replace by "an altar table in teak" as per plan submitted with the specification, is sufficient for the lawful requirements of the clergy and worshippers in the said church of St. Mark's Wimbledon ; and that the proposed "new altar with steps and ornaments" would be in contravention of the established law on the subject : the judgments of the Judicial Committee of the Privy Council in *Sheppard* v. *Bennett* (2) and *Martin* v. *Mackonochie* (3) ; *Liddell* v. *Westerton* (4) and *Parker* v. *Leach* (5) ; and of the Dean of the Arches in *Faulkner* v. *Litchfield.* (6)

That the proposed "altar lights," if intended to be used as in the other churches in the parish of Wimbledon only or chiefly during the celebration of the Holy Communion, and when not required for the purpose of giving light, are illegal ; as is also the proposed cross, whether actually placed upon the holy table itself, or upon what appears from the plan to be intended as a retable, the latter being so close to the holy table as to make the cross and candlesticks appear to be upon the said holy table. The proposed dorsal and side hangings would tend to create a need for artificial lights otherwise unnecessary, and would also be a colourable imitation of a baldacchino.

It was further pleaded in the act on petition that the proposed steps of teak to the proposed altar were unnecessary for a holy table in accordance with the law and usage of the Reformed Church of England; that the proper place for such holy table was upon the floor of the church; that the petitioners' proposal as to the "new altar with steps and ornaments" was contrary to the formularies, articles, and spirit of the Church of England, and would, if carried out, seriously offend and wound the consciences of many parishioners, and that for all the reasons set forth in the act on petition the opponent prayed that the prayer of the petitioners, so far as it related to the proposed "altar with steps and ornaments," should be refused.

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(1) The other proposed alterations were : (1.) The installation of heating apparatus ; (2.) the removal of the organ from south to north ; (3.) the rearrangement of choir seats ; (4.) the rearrangement of certain seats to be removed from the north side of the church. These alterations were unopposed.

(2) (1871) L. R. 4 P. C. 371.

(3) (1868) L. R. 2 P. C. 365.

(4) (1857) Moore's Special Report.

(5) (1866) L. R. 1 P. C. 312.

(6) (1845) 1 Roberts. 184.

The petitioners joined issue with the opponent on his act on petition, and prayed that the pleadings might be closed.

1907. Nov. 30. The cause was heard before the Chancellor of the diocese of Southwark (George J. Talbot, Esq., K.C.). (1)

E. W. Hansell appeared for the petitioners and moved the faculty.

The opponent appeared in person. (2)

The result of the material evidence and the points raised in argument can be fully gathered from the judgment of the Court.

Cur. adv. vult.

1907. Dec. 11. THE CHANCELLOR. In this case a petition was presented by the vicar and churchwardens of the parish of Wimbledon for a faculty authorizing certain alterations in the church of St. Mark, which is a consecrated chapel of ease in the parish.

The petition was opposed, so far as it included the erection of a "new altar with steps and ornaments" according to certain designs scheduled to the petition, by Mr. Christopher Hammond

(1) The Court sat in the Lady Chapel of Southwark Cathedral.

(2) He referred to *Marshall* v. *Andrew* (Consistory Court of Manchester, June, 1873, not reported), and stated that in that case the then Chancellor of the diocese of Manchester had refused to allow a plea to be filed in which the holy table in a church was referred to as an "altar."

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Eden, a parishioner of the ecclesiastical parish of Wimbledon, of which St. Mark's is a chapel. The design referred to shews, apparently, a plain wooden table standing on two steps, with a plain cross and two candlesticks standing upon it. It was stated in evidence, however, that it was intended to place the cross and candlesticks on a ledge fixed to the east wall of the church and separate from the holy table. The design also shews curtains behind and on each side of the table. The holy table at present in the church is described as being an ordinary kitchen table, and it is desired to substitute one more solid and dignified.

The resolution to apply for a faculty for these things was submitted to, and unanimously passed by, two very small meetings of the vestry of Wimbledon (that is, meetings summoned in the way in which meetings of the civil parish of Wimbledon are summoned) held respectively on June 13 and September 19 of this year. Notice of the meeting of June 13 was posted on all the churches and chapels of the ecclesiastical parish of Wimbledon; notice of the meeting of September 19 on the parish church and St. Mark's only. The vicar, having heard that there was some opposition to the faculty, took the further step of addressing a printed circular to the heads of all families holding seats in, or habitually attending, St. Mark's Church, asking them to attend a meeting for the consideration of the matter. Accordingly sixty-six persons met on October 11, and a resolution approving of the proposal was carried without dissent, sixty-three of those present voting for it.

The object of the practice of requiring in an ordinary parish that any proposal for alterations in the church should be submitted to the vestry is that an opportunity should be given to those who have the legal right to attend the church of expressing their opinion. In such parishes as Wimbledon, which have been divided for ecclesiastical purposes into several distinct parishes, that object is not attained by submitting matters of this sort to the vestry of the ancient civil parish, and I think therefore that the vestry meetings of June and September were superfluous: see the case of *St. Matthias, Richmond.* (1)

(1) [1897] P. 70.

It is unnecessary therefore to consider the point taken by the party opponent that these meetings were improperly summoned because notice of them was not affixed on or near the doors of all the churches and chapels in the civil parish of Wimbledon as prescribed by s. 2 of the Parish Notices Act, 1837 (7 Will. 4 & 1 Vict. c. 45). In such cases as this it is enough if those who are principally concerned have had a sufficient opportunity of expressing their sentiments on the matter, and I think that the meeting of October 11 was such an opportunity.

Apart from this matter of the vestry meeting, the points raised by the act on petition given in by the party opponent are, in brief—(1.) that what is proposed is illegal; (2.) that the curtains would unduly darken the east end of the church; (3.) that the steps are unnecessary and improper; (4.) that the alterations proposed would offend the consciences of many parishioners.

As to the objection of illegality, on the face of it this table, with its accessories, whether they are placed on it or just above it, seems to be as harmless a piece of church furniture as could easily be imagined; and it is a strange proposition that, although no enactment either of Church or State to that effect can be quoted, it is forbidden by law. The act on petition refers to certain reported decisions, of which two only are at all relevant, namely, *Faulkner* v. *Litchfield* (1) and *Westerton* v. *Liddell.* (2) In those cases it was held by the Court of Arches that the table prescribed by the canon and rubrics is a table in the ordinary sense of the word, that is (as was decided), it must be movable, flat, and made of wood. In *Liddell* v. *Westerton* (2) these decisions of the Ecclesiastical Courts were approved and affirmed respectively by the Judicial Committee of the Privy Council. The table which the Court is asked to sanction in the present case fulfils all the requirements above mentioned, being wooden, movable, and flat; and, indeed, it appears to fulfil them more indubitably than that which Dr. Lushington decided to be a lawful table in *Westerton* v. *Liddell.* (2) The contention that it is illegal is, in my opinion, wholly unreasonable.

Then, as to the cross. There is clearly no legal objection to

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(1) 1 Roberts. 184.

(2) Moore's Special Report.

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the cross in itself as a piece of church decoration or furniture. The growth of information on these subjects has got rid of the notions formerly entertained that crosses are forbidden by statute as images, and that they are illegal ornaments as not being within the ornaments rubric. It is clear that, even if crosses were images, there is no law in force against images generally: *Boyd* v. *Phillpotts* (1); and that crosses not used in the service are not ornaments within the meaning of the rubric: *Liddell* v. *Westerton.* (2)

In the act on petition it is alleged that the cross in the present case is illegal, "whether actually placed upon the holy table itself or upon what appears from the plan to be intended as a retable, the latter being so close to the holy table as to make the cross and candlesticks appear to be upon the said holy table." In *Liddell* v. *Westerton* (3) a table with the "cross attached to it"—that is, as appears from p. 151 of Moore's Report, "let into, and fixed into it"—was considered not to be a table within the canon and rubrics because the insertion of the cross prevented the table from being flat. (4) In *Liddell* v. *Beal* (5) the Judicial Committee decided that a movable ledge of wood, with candlesticks and vessels on it, placed upon the holy table was not inconsistent with a monition to provide "a flat movable table of wood." The principle of these decisions plainly is that, as the holy table must be flat for the reason already stated, it is unlawful so to attach anything to it as to interfere with its flatness. In each case it is a question of fact whether what is proposed would have that effect.

In the present case there are two alternatives to be considered. If the cross is to be placed on a ledge which does not touch the holy table, it is obvious that it cannot interfere with its flatness or movableness. I see, therefore, no possible ground on which, if so placed, it can be said to be illegal, whatever may be thought of the fitness in other respects of such an arrangement. Some difficulty is certainly caused by the case of *Durst* v. *Masters* (6), in which it was held by the Judicial Committee of the Privy Council (reversing the decision of the Provincial Court) that a movable cross fixed to the wall of the church immediately above the holy table, but not fastened to it nor actually touching it, was illegal within the principle of *Liddell* v. *Westerton* (1) and *Liddell* v. *Beal* (2), apparently because, though the cross and the ledge did not in fact prevent the table from being flat, they looked from a little way off as if they did. I confess that I am quite unable to understand this decision, or how it can be reconciled with *Liddell* v. *Beal*. (2) However, even assuming that judgments of the Judicial Committee of the Privy Council bind the Ecclesiastical Courts in the sense in which the judgments of the House of Lords bind the Courts of common law, they can only do so in so far as they establish some principle of law (see, e.g., per Jessel M.R., *Re Hallett's Estate* (3)); and whatever may be the true explanation of *Durst* v. *Masters* (4), it is evident, I think, that it neither lays down, nor purports to lay down, any principle other than that declared in *Liddell* v. *Westerton*. (1)

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(1) (1874) L. R. 4 A. & E. 297; (1875) L. R. 6 P. C. 435.

(2) Moore's Special Report, at p. 159.

(3) Moore's Special Report.

(4) Ibid. at p. 186.

(5) (1860) 14 Moo. P. C. C. 1.

(6) (1876) 1 P. D. 123, 373.

On the other hand, if the cross is to be placed on the holy table itself, the question for the Court is the same: Will the placing of a movable cross upon the table prevent it from being movable and flat? Or, in other words, Is a table with such a cross upon it anything but a table? In my opinion obviously not.

I am of opinion therefore that, whether the cross is on or just above the holy table, there is no objection to it in point of law.

The same principles apply to the candlesticks, and I need not repeat what I have said as to the cross. I may observe, however, that in *Westerton* v. *Liddell* (1) Dr. Lushington refused to order the removal of candlesticks and candles placed on the holy table. The party opponent here takes a further point. He says that the candles are intended to be lighted at celebrations of the Holy Communion when light is not needed, and are therefore illegal. The vicar in his evidence stated that it was not proposed so to use the candles at present, but that he would not

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(1) Moore's Special Report.

(2) 14 Moo. P. C. C. 1.

(3) (1880) 13 Ch. D. 696, at p. 712.

(4) 1 P. D. 123, 373.

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give any pledge that they would not be so used. As to this, it is enough for me to say that in the latest case on this subject (*Read* v. *Bishop of Lincoln* (1)) it was held in the Court of the Archbishop of this province that such lights are lawful, and it would be very improper for me to condemn as illegal church furniture which is otherwise perfectly innocent, merely on the ground that it may be used in a way which such authority as I have mentioned has pronounced to be lawful.

As to the second point, that the curtains would unduly darken the east end of the church, I am satisfied that there is nothing in it in point of fact.

With regard to the steps, Mr. Eden appears to think that anything which raises the holy table above the floor of the church is improper. This objection does not need serious discussion.

The last allegation is that the alterations proposed would "seriously offend and wound the consciences of many parishioners." Having listened attentively to the evidence called in opposition to the faculty, I am bound to say that I am by no means satisfied that there is any foundation in fact for this allegation. Even if there were—if, that is, any considerable number of parishioners did object in good faith on religious grounds—that cannot be conclusive in such a case as this. Where the question is of something purely decorative, such as a picture or an alteration of the architecture of a church, it may be right to give effect to objections taken in good faith by a considerable number of parishioners, even if they appear unreasonable. This case is different. A holy table is a necessary part of the equipment of a church, and it is right that, like everything else in the church, it should be as dignified and handsome as is practicable in the circumstances. Again, though such accessories to it as a cross and candlesticks are not in any sense necessary, they are usual and seemly, and the Court ought not to give effect to objections to them which have not some foundation in law or good sense. Nor is there any reason why the feelings of those who desire to have something in their church beyond what is barely necessary should be disregarded.

(1) [1891] P. 9.

Having therefore examined the grounds alleged against the grant of this faculty, I come to the conclusion that there is nothing whatever either illegal or objectionable in what is proposed, and accordingly I decree the faculty asked for, subject to two observations:—

First, as I have explained, there is in my opinion no legal objection to the placing of the cross and candlesticks on the holy table itself, and, as that is certainly the more correct position for them, the faculty will authorize it, with an option (if they wish it) to the vicar and churchwardens to place them on such a ledge as was mentioned in evidence.

Secondly, I understand that the steps will be constructed (as is shewn in the ground plan) so as to allow the priest, if he be so minded, to celebrate at the north end of the holy table, that being, in the words of Archbishop Benson, "beyond question a true liturgical use in the Church of England": *Read* v. *Bishop of Lincoln.* (1) The drawing put in does not agree with the ground plan, and appears to be incorrect.

Solicitors for petitioners: *Day & Son.*

C. F. J.

(1) [1891] P. 9, at p. 49.

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Jan. 14, 15, 21, 27.

BALCOMBE *v.* BALCOMBE.

Divorce—Wife's Suit—Cruelty and Adultery—Deed of Separation—Covenant not to sue for any previous Offence—Husband's Breaches of other Covenants —Subsequent Adultery—Revival of Cruelty—Decree Nisi.

Where a deed of separation in an undefended case contained a covenant not to sue for a previous matrimonial offence, and the party whose offence had been thus condoned was shewn to have committed serious breaches of his obligations under the deed, and had in effect repudiated it, the Court held the deed not to be a bar to the right of the other party to have the marriage dissolved on grounds partly founded on the matrimonial offence committed before the date of the deed.

THIS was an undefended suit by the wife, who prayed for the dissolution of her marriage on the grounds of the cruelty and adultery of her husband.

The parties were married on April 30, 1885, at Holy Trinity Church, Wallington, in Surrey, and they cohabited at Wallington and other places, there being three children issue of the marriage, only one of whom, however, was still under twenty-one years of age.

In consequence of her husband's cruelty the petitioner insisted on a deed of separation, which was executed on March 25, 1899, but after October, 1899, the husband paid nothing under the deed.

In 1903 he proceeded to British Columbia, where he afterwards lived in adultery with a woman named Ellis.

R. F. Colam, for the petitioner. The cruelty which preceded the deed is revived by the subsequent adultery. Although the material clause in the present deed is identical with that in *Rose* v. *Rose* (1) down to the word "condoned," the clause in *Rose* v. *Rose* (1) has an addition which distinguishes it. The recent decision in *Norman* v. *Norman* (2) is in favour of the petitioner. [He also referred to *Kennedy* v. *Kennedy*. (3)]

SIR GORELL BARNES, PRESIDENT. In my view *Rowley* v. *Rowley* (4) is more against you than *Rose* v. *Rose*. (1) I will adjourn the case for you to look further into the authorities.

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(1) (1882) 7 P. D. 225; (1883) 8 P. D. 98.

(2) Ante, p. 6.

(3) [1907] P. 49.

(4) (1866) L. R. 1 H. L. (Sc. & Div.) 63.

Jan. 21. *Barnard, K.C.*, and *Colam*, for the petitioner. *Rowley* v. *Rowley* (1) does not govern this case. The husband set up the deed in that case, and the House of Lords therefore upheld it. *Kennedy* v. *Kennedy* (2) was a restitution suit, and is, therefore, also distinguishable. In *Rose* v. *Rose* (3) the deed was pleaded, and it was, therefore, held to be a bar. In *Tress* v. *Tress* (4) the deed was not pleaded, and the decision in that case was repeatedly followed, and as recently as the year 1898 in *Dowling* v. *Dowling* (5), where *Rose* v. *Rose* (3) was distinguished. [They also referred to *Kunski* v. *Kunski and Josephs.* (6)]

Cur. adv. vult.

Jan. 27. SIR GORELL BARNES, PRESIDENT. This was a case in which the petitioner, Mrs. Kate Balcombe, sued her husband, whom she married on April 30, 1885, for a divorce on the grounds of cruelty and adultery. The cruelty was alleged to have taken place in the years from 1892 or thereabouts to 1898 or 1899, and there was evidence from the petitioner and other witnesses which satisfied me that the case of cruelty was established. The alleged adultery was on the part of the husband with a woman in British Columbia in the year 1893 or 1894, and onwards for a year or two, and that adultery was established. But a point arose in consequence of a deed of separation which had been entered into between these two parties on March 25, 1899, after which he had gone to America.

Now this case illustrates one of the inequalities which on other occasions I have had to refer to between husband and wife. If this had been a petition by the husband, and it had been proved by the husband that his wife had been living in adultery elsewhere with another man, the husband, of course, could have obtained a decree of divorce on the ground of that adultery, unless there were something in his own conduct to prevent it. The position of the petitioner is different; she has to prove adultery on the part of her husband, who has been living in America in a new home with another woman. But that would not be enough; she would have also to prove in the ordinary class of case either cruelty or desertion. It might be a case in which she could not prove cruelty, and might have to *endeavour to prove* desertion. There might, however, have been a magistrate's order or some deed of separation preventing her from establishing desertion, and, even if she could prove desertion, she would have to wait two years before she could put it as a charge. The inequality is apparent. The situation in each case is the same; the joint life has become impossible, and the respondent in each case has set up a new home. One cannot help feeling that the framers of the Act of 1857 did not anticipate how the development of rapid communication would produce cases like this, where it is reasonable that the party left behind, whether man or woman, should be able to obtain a divorce if desirous of doing so on similar grounds; and these cases are now cases of every-day occurrence, in which the guilty person departs to some colony or other country.

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(1) L. R. 1 H. L. (Sc. & Div.) 63.

(2) [1907] P. 49.

(3) 7 P. D. 225; 8 P. D. 98.

(4) (1887) 12 P. D. 128.

(5) [1898] P. 228.

(6) (1898) 68 L. J. (P. & M.) 18.

However, I have to deal with this case as I find it, and the difficulty arises from this deed. Prima facie the wife has a right to a decree; she has proved cruelty and she has proved adultery. But counsel very properly called my attention to the fact that there was this deed of separation, under which these parties had agreed to separate. Now the terms of this deed, so far as material, I will state shortly, because I think they have a bearing on the case. They are as follows: "That in pursuance of the said agreement and for the considerations herein appearing the said Stephen Brown Balcombe so far as the agreements and provisions hereinafter contained are or ought to be performed or observed by him or his heirs executors or administrators doth hereby covenant with the said Kate Balcombe and the said Kate Balcombe so far as the agreements and provisions hereinafter contained are or ought to be performed or observed by her or her heirs executors or administrators doth hereby covenant with the said Stephen Brown Balcombe in manner following." Then follow certain usual covenants about her being allowed to live separate and against molestation; and then, "No proceedings shall be commenced or prosecuted by or on behalf of the said Stephen Brown Balcombe or the said Kate Balcombe against the other in respect of any cause of complaint which now exists or has arisen or is alleged to exist or to have arisen before the date of these presents and every offence (if any) which has been committed or permitted by either of them the said Stephen Brown Balcombe and Kate Balcombe against the other shall be considered as hereby forgiven and condoned." Those words are practically identical with the first part of the covenant which was the subject of consideration in the case of *Rose* v. *Rose*. (1) The deed then makes provision for the payment by the husband to the wife of the annual sum of 260*l*., commencing on the date mentioned; and then there are other provisions about the property of the wife and custody of the children, and there is a concluding clause, which is as follows: "Provided always and it is hereby agreed that if the said Stephen Brown Balcombe and Kate Balcombe shall be reconciled and return to cohabitation, or if their marriage shall be dissolved or they shall be judicially separated by reason of any misconduct of the said Kate Balcombe occurring after the date hereof then and in such case all the covenants and provisions herein contained shall become void." It is curious that that does not relate to misconduct on the part of the husband, but only on the part of the wife. That being the deed, and this being an undefended case, the husband does not appear to set that deed up, and the point is suggested that, that being so, the Court ought not to take any notice of it, and reliance was placed on the case which was before me a short time ago of *Kennedy* v. *Kennedy*. (2) I suggested when the present case came before me at first that it was desirable that it should be adjourned in order that counsel might consider the authorities and prove any further facts which it was desired to put before me bearing upon this point; and that was subsequently done on the adjourned hearing. Now the case of *Kennedy* v. *Kennedy* (2) is not precisely the same, because that was a suit for restitution of conjugal rights. It is reported in the February number of last year's *Law Reports*, Probate Division. That was an undefended suit by a wife for restitution of conjugal rights, and there was a deed which contained a covenant not to sue for restitution, and it was suggested that the Court

(1) 7 P. D. 225; 8 P. D. 98.

(2) [1907] P. 49.

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ought not to take notice of the deed because it was not set up by the respondent. I did not take that view, because, that suit being a suit which I think was admittedly—or, at any rate, might have been intended to be—a suit preliminary to a suit for divorce, in which suit the petitioner would have to make out desertion and adultery, it was obvious that the suit was a suit instituted merely to establish a case of desertion. Desertion is really a question of fact, and, as I said in that case, "Her claim to restitution rests on the separation of the parties being without good cause; and such a claim cannot properly be maintained where there is a deed with such a covenant as this, which is itself prima facie, good cause for the separation"; and I thought that the deed was one which should be looked at, and that, if it were such that there was an absolute bargain which ought to amount to a bar in the circumstances, it would be difficult for the Court to overlook the deed and to pronounce a decree, especially where the suit was a preliminary step upon which to found one of the grounds for proceeding to institute a suit to obtain a decree of divorce. That case is, of course, from that statement of it, a case in which there is a very much stronger reason for the Court taking some action upon the basis of the deed than the present case, because this is a case in which, cruelty and adultery being established, it follows that, unless there is some offence brought to the attention of the Court which would require the Court to exercise its discretion adversely to the petitioner, or unless a contract is set up barring the claim, the Court is not hampered in finding facts which give a prima facie right to a decree of divorce to the same extent as it may be when it is asked to find desertion and a wrongful refusal to return in face of a deed of separation.

But it is not necessary, to my mind, to decide this suit on the question of what the Court's action on its own initiative should be, because this is a case in which the covenants in this deed may possibly be said to be mutual covenants. They are for all practical purposes dependent the one upon the other. I do not intend to decide absolutely and definitely, without any argument, whether these ought to be strictly treated as dependent or independent covenants, and I do not desire by anything I say in this case to

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dispose of any future case in which a deed has to be strictly construed, or is set up in order to be strictly construed. But when one comes to see that it is for all practical purposes a deed in which each party at the time of entering into the deed relies on the covenants on the other side, and considers the fact that the deed is proved in this case to have been wholly repudiated (I think that is the true effect of the evidence) by the husband, who had not only ceased to make payments under it and to carry out his portion of it, but has torn up the copy which he had and departed from this country for America and established himself anew, I think it would be quite wrong to hold that in such a state of circumstances this deed is to be treated as any longer binding on the petitioner or as a bar to her right to obtain a divorce on the grounds of cruelty and adultery.

Therefore I pronounce a decree nisi in favour of the wife against the husband, with costs, and order that she do have the custody of the youngest child of the marriage, who is the only child for whose custody the petitioner asked.

Solicitors: *Edridge & Newnham.*

H. D. G.

1908
Feb. 11, 12.

THE COCKATRICE.

Admiralty — Collision — Drifters' and Trawlers' Lights — Regulations for Preventing Collisions at Sea, 1897, *art.* 9 (1906), *sub-ss.* (*b*), (*d*).

A steam drifter was fishing in the North Sea with over 2000 yards of gear out, and was exhibiting the two white lights prescribed by art. 9, sub-s. (*b*), of the regulations for preventing collisions at sea, for vessels "fishing with drift nets," when those in charge observed, upwards of a mile away, a vessel which they thought was entangled in their gear. They thereupon cast off and buoyed the nets, and steamed up to the other vessel, but so negligently manœuvred their own vessel that she was sunk in collision. The other vessel, which proved to be a steam trawler, had, prior to the collision, been trawling in one direction for an hour, then in the opposite direction for an hour, and then turned again, shooting, and hauling in, her trawl in the usual way, and all the time carrying the tri-coloured lantern required by sub-s. (*d*) of the same article, for steam vessels "when engaged in trawling." On the question of lights:—

Held by Bargrave Deane J., that the drifter had infringed the regulations, for, when she left her nets, she should have taken in her fishing lights and exhibited the lights indicated by the first paragraph of art. 9, for vessels "under way"; whilst the steam trawler had rightly exhibited the triplex light the whole time, for she was to be deemed to be trawling, not only when she had her trawl down, but during the interval between hauling it up and shooting it again, though if she hauled up her trawl, and, instead of shooting it at once, steamed off to trawl over some other ground, it would then become necessary for her to exhibit "under way" lights.

The Upton Castle, [1906] P. 147, distinguished.

Action of Damage by Collision.

The plaintiffs were James Pitchers, owner of the late steam drifter *Rival*, and her master and crew suing for the loss of their clothes and effects.

The defendants were the owners of the steam trawler *Cockatrice*.

The case is reported on the question of the meaning to be attached to the words "when fishing with drift nets," and "when engaged in trawling," as opposed to "when under way," in the regulations as to the lights of British fishing vessels which came into force on May 1, 1906. (1)

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(1) By Order in Council made April 4, 1906, under the powers conferred by s. 418 of the Merchant Shipping Act, 1894, with regard to the lights and signals to be used by British fishing vessels, the provisions

On October, 1, 1907, about midnight, the *Rival*—a wooden steam drifter belonging to Great Yarmouth, of sixty tons gross register, engines of thirty horse-power nominal, and a crew of ten hands—was in the North Sea, some fifty miles east-south-east of the Spurn light, fishing with drift nets, and carrying the two white lights required by the regulations. The weather was fine, the wind about south-east light, the tide flood running from one to two knots, and the *Rival*, which had about six hours previously shot her nets, was laid away heading to the wind, with about 2560 yards of gear out ahead, when, according to the

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of the Orders in Council of August 11, 1884, December 30, 1884, June 24, 1885, and October 23, 1905, so far as they relate to British fishing vessels, were repealed, and the new article in the schedule to that order is to be read and construed as part of the regulations contained in Sched. I. to the Order in Council of November 27, 1896, and as if it had formed one of such regulations and had been numbered 9 among the articles containing the same.

Art. 9: "Fishing vessels and fishing boats, when under way and when not required by this article to carry or shew the lights hereinafter specified shall carry or shew the lights prescribed for vessels of their tonnage under way. . . .

"(*b*) Vessels and boats, except open boats as defined in subdivision (*a*), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to shew all round the horizon, and to be visible at a distance of not less than three miles. . . .

"(*d*) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

1. If steam vessels, shall carry in the same position as the white light mentioned in art. 2 (*a*), a tri-coloured lantern so constructed and fixed as to shew a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides respectively; and, not less than six nor more than twelve feet below the tri-coloured lantern, a white light in a lantern, so constructed as to shew a clear uniform and unbroken light all round the horizon," and to "be visible at a distance of at least two miles."

evidence, those in charge observed, distant about one and a half miles, and bearing about two points on the starboard bow, a red light which was apparently the side light of a vessel. The light drew ahead, and then disappeared, two white lights, one high and the other low, coming into view and remaining stationary ahead of the *Rival*, in whose gear the vessel carrying them appeared to be entangled. Shortly afterwards a green light was made out higher up than the white lights, but apparently on the same vessel, which proved to be the *Cockatrice*, a steam trawler of 115 tons gross register, engines of forty horse-power nominal, and a crew of nine hands, out from Grimsby in the course of a fishing voyage.

According to those on board the *Rival*, as the bearing of the lights did not alter, her nets were cast off and buoyed, and the *Rival* steamed up towards the *Cockatrice* at a speed of about two to three knots, leaving her nets on the starboard side. The green light on the *Cockatrice* remained visible, and the *Rival* continued on her course shaping to pass under the stern of the *Cockatrice*, which, from the position of her lights, appeared to be heading almost south-west, and when she was about a length and a half distant the engines of the *Rival* were stopped in order that the number of the other vessel might be obtained. Those on board the *Rival* alleged that they then observed that the *Cockatrice* was in fact heading almost north-east with her light shewing green on the wrong side, and that she was coming ahead involving danger of collision, to avoid which the engines of the *Rival* were ordered full speed ahead and her helm put hard-a-port to throw her quarter clear, but the *Cockatrice*, continuing to come ahead at considerable speed, with her stem struck the *Rival* a heavy blow on the starboard side just abaft amidships, cutting right into her, so that she immediately began to settle down and sank in a few minutes.

Those in charge of the *Cockatrice* alleged that, after shooting her trawl at midnight, she was towing north-north-west, and making about one and a half miles over the ground, with her regulation trawling lights duly exhibited, namely, a tri-coloured lantern on the foremast, together with an all-round white light below the triplex light, when they saw the two white drift fishing lights of the

Rival about a mile distant, and bearing about west-north-west. They then observed that the *Rival* was approaching, and, when close to, it was seen that she was attempting to cross the bows of the *Cockatrice*, whose engines were thereupon stopped; but, the *Rival* coming on, the collision occurred.

With reference to the main charges made by the plaintiffs against the defendants, namely, that (1.) "the trawling light carried by the *Cockatrice* was improperly exhibited so as to shew green on her port side," and that (2.) "the *Cockatrice* when under way improperly failed to exhibit the masthead and side lights as required by the regulations." The learned judge—who was assisted by two of the Elder Brethren of the Trinity House—found against the plaintiffs on both points; but held in favour of the defendants' charge, that the plaintiffs had neglected "to carry and exhibit lights in accordance with the regulations."

1908. Feb. 11, 12. *Laing, K.C.*, and *H. C. S. Dumas*, for the plaintiffs, the owner of the *Rival* and others.

The arguments of counsel sufficiently appear from the judgment.

Lauriston Batten, K.C., and *A. D. Bateson*, for the defendents the owners of the *Cockatrice*, were not called upon.

BARGRAVE DEANE J. This is an action brought by the owners of the steam drifter *Rival* against the steam trawler *Cockatrice* for damage caused on October 1 last, somewhere about half-past twelve o'clock at night.

The main point taken by the plaintiffs in their pleadings is that the trawler had not got her lights up properly—that, whereas she should have shewn by her tri-coloured light her green light on the starboard side and the red light on the port side, by some accident or injury to her light gear she was shewing a green light upon her port side. That, according to the plaintiffs, was the sole cause of this collision, because they say we came down upon that green light, and thought by reason of it that we were passing under her stern, whereas we were passing under her bows, and we noticed that she was then steaming ahead, and in order to avoid a collision we put our engines full speed ahead to get out of the way, but she struck us on the starboard side about amidships, and we sank. When once the question of the lights on board the trawler is got rid of—that is to say, when once the Court is satisfied that she was shewing a green light to starboard and a red light to port—then the case of the drifter is hopeless, because not a single man on board the drifter, apparently, ever saw the trawler's red light. How was that? If she was shewing a red light on her port side and a green light on her starboard side, how is it that not a single man on board the drifter ever saw the red light? On the other hand, we can understand how it was that they saw this green light, and how it was that, seeing the green light, they may have come to the conclusion that the green light of the trawler was unpleasantly near the drifter's nets, because we are told that, shooting the nets at half-past eight, the *Cockatrice* trawled south for an hour and north for an hour, and then south again for an hour. Therefore, at the end of the third hour's trawling, she would be steaming south, and that would be shewing the green light to the drifter; and she had to stop her engines in order to lift the trawl, and she would be shewing her green light until in the course of the operation she had to go round under port helm and get her net to windward and open her red light to the drifter. Then she would haul her net. That is what she did, and undoubtedly she got down pretty near to the end of those nets. It is not suggested now that she did foul them, but there might have been reason in the mind of the skipper of the drifter for thinking she had fouled them or might foul them, and therefore it might be a reasonable thing to go down and get her name. All the nets have been recovered, and it is not suggested that they had been fouled or damaged in any way. I only mention this because it is a reason for the drifter acting as she did.

Now, the operation of hauling the trawl and shooting it again takes, we are told, about twenty minutes, and she began to haul the trawl at 11.30. Therefore it would be ten minutes to twelve when she again shot her trawl. She would be shewing her red light all that time to the drifter. Everybody agrees that the collision took place at about half-past twelve. How comes it that there is that interval of time unaccounted for by the drifter? She had to buoy her nets, get steam up, and then steam away to the eastward to clear her nets before she came down, and that is what the trawler saw her do—steam away to the eastward and then come down on the port side. Undoubtedly this drifter was, before the collision, on the port side of the trawler, because she was sunk by a blow on the starboard midships, she crossing from port to starboard. It is incredible that the people on board the drifter, if they had looked for it, could not see the trawler's red light. It is impossible to believe the evidence from the drifter. It is incredible that they should have seen nothing but the green light until immediately before the collision.

The evidence from the trawler is perfectly conclusive, and I believe the evidence of the engineer that he was steaming ahead for some considerable time before the collision, and that he only stopped the engines immediately before the collision under order from the skipper because the collision was imminent. For these reasons I think no case has been made out at all against the *Cockatrice*, but I am afraid I cannot say the same with regard to the drifter. Counsel for the plaintiffs have to admit that their vessel was in fault with regard to lights, because, having left her nets, then the rule does not apply, and she has to exhibit, not fishing lights, but steaming lights. She seems to have left her nets and steamed a considerable distance, but still had the ordinary fishing lights up, and I think she was wrong in that. I cannot excuse her for it. It must not be supposed that fishing vessels need not abide by the rule. Counsel for the plaintiffs, however, say that what is sauce for the goose is sauce for the gander, and that the same rule applies to the trawler. The rule is clear—that a trawler when trawling must have her fishing lights up, and when not trawling must have steaming lights up. How am I to construe that rule? Is it to be said that a trawler is to shift her lights directly the trawl is off the bottom and put up steaming lights, and then, directly she shoots her nets, alter her lights again? As far as my own knowledge goes it does not take very long to untie, let out your catch, tie up again, and shoot the trawl again. I do not suppose it would take more than five or ten minutes to do the whole. As

I read the rule it means this, that you are fishing when you have your trawl down, or are hauling up your trawl, or shooting it; but that if, having hauled your trawl up, you do not shoot it at once, but steam off to some other spot to trawl, then, as I said, in another case (1), some time ago, you cease to be fishing, and you must put up steaming lights. I think a distinction has to be drawn. If a trawler, immediately after hauling her net, without going to any other ground, shoots her trawl, then she is still fishing during the interval, but if she changes her ground, then she must change her lights. I do not think in this case that the trawler did infringe art. 9, sub-s. (*d*), and therefore I do not think she is to blame.

The general result of the case is that I believe the evidence of the trawler and do not believe that we have had the whole story told by the drifter, for the simple reason that it is incredible that those men who have been called—I think eight or nine of them out of ten—from the drifter should none of them have seen that red light. The red light has been suppressed for reasons which I need not trouble myself about. I believe the evidence from the trawler in preference to that from the drifter, and I find the drifter alone to blame.

Solicitors for plaintiffs, the owner of the *Rival* and others: *Dubois & Co., for Chamberlin & Talbot, Great Yarmouth.*

Solicitors for defendants, the owners of the *Cockatrice: Deacon, Gibson, Medcalf & Marriott, for Grange & Wintringham, Great Grimsby.*

(1) *The Upton Castle*, [1906] P. 147.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1908
March 4, 5.

THE HAGEN.

Admiralty—Practice—Collision in Foreign Waters—Lis alibi pendens—Service out of Jurisdiction—Rules of the Supreme Court, Order XI., *r.* 1 (*g*).

A British ship, coming down the Elbe, came into collision with another British ship, which, in turn, came into collision with a German vessel. The agents at Hamburg of the first British ship and the owners of the German vessel exchanged letters of guarantee; but the owners of the German vessel did not commence legal proceedings in Germany against the owners of the two British ships until after the owners of the first British ship had commenced an action in personam in this country against the owners of the other British ship and the owners of the German vessel. On an application to discharge an order giving the owners of the first British ship leave—under Order XI., r. 1 (*g*), of the Rules of the Supreme Court—to serve notice of the writ on the owners of the German vessel out of the jurisdiction:—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), that the order ought not to have been made, for there had not been any unreasonable delay on the part of the owners of the German vessel in following up, by legal proceedings, the original cross letters of guarantee.

Per Farwell L.J.: Observations on the caution required in exercising the discretionary power of giving leave to serve notice of a writ on a foreigner out of the jurisdiction.

Appeal by defendants, the Deutsch-Australische Dampfschiff-Gesellschaft, resident out of the jurisdiction, namely, at Hamburg, in the German Empire, against the refusal of Bargrave Deane J. to discharge an order giving leave to serve notice of a writ upon these defendants, in an action in personam, of damage by collision, brought by the plaintiffs, the Great Central Railway Company, resident within the jurisdiction, against the Burnett Steamship Company, Limited, resident within the jurisdiction, and against these defendants.

The plaintiffs, the Great Central Railway Company, are the owners of the steamship *City of Bradford;* the defendants, the Burnett Steamship Company, Limited, are the owners of the steamship *Hartley*, and the defendants the Deutsch-Australische Dampfschiff-Gesellschaft are the owners of the steamship *Hagen*.

In the early morning of September 27, 1907, the *City of Bradford* was coming down the Elbe, and the *Hartley*, followed by the *Hagen*, was proceeding up the river. The *City of Bradford* came into collision with the *Hartley*, and the *Hartley*, owing, it was alleged, to improper manœuvres on the part of the *Hagen*, fell across the bows of the latter vessel. On September 30 the plaintiffs, the owners of the *City of Bradford*, under a threat of arresting the *Hagen*, obtained, in Hamburg, a letter of guarantee by way of security for bail from the defendants the owners of that vessel, and the plaintiffs, as owners of the *City of Bradford*, gave similar security to the defendants as owners of the *Hagen*. On October 2 legal proceedings were commenced in the Lower Court of Hamburg by the defendants, the owners of the *Hagen*, against the defendants, the owners of the *Hartley*, and October 3 was fixed for the examination of the witnesses of the *Hartley*. In the meantime (September 30) an action in rem was instituted in the High Court, Probate, Divorce and Admiralty Division (Admiralty), by the defendants, the owners of the *Hartley*, against the plaintiffs, the owners of the *City of Bradford*. On October 2 the defendants, the owners of the *Hartley*, accepted service of the writ, in the present action in personam, issued by the plaintiffs, the Great Central Railway Company, as owners of the *City of Bradford*, and issued a summons to consolidate this action with the action brought by the defendants, the owners of the *Hartley*, against the *City of Bradford;* but this summons was ordered to stand over until after the appearance in the present action of the Deutsch-Australische Dampfschiff-Gesellschaft, the owners of the *Hagen*, to the notice of the writ issued, by leave of the vacation judge (Parker J.), out of the Central Office, and which was served on these defendants on November 16. On November 26 these defendants, as the owners of the *Hagen*, appeared under protest, and, on December 6, proceedings were instituted in Hamburg by the guarantors of these defendants, the owners of the *Hagen*, against the guarantors for the *City of Bradford* and the *Hartley*.

1908. Jan. 27. *Laing, K.C.*, and *Arthur Pritchard*, in support

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of the motion before Bargrave Deane J. to discharge the order giving leave to serve notice of the writ out of the jurisdiction. The defendants, the Deutsch-Australische Dampfschiff-Gesellschaft, appear under protest, and object to the jurisdiction, on the ground that the *Hagen* is a German vessel; that there was no collision between the plaintiffs' vessel and the *Hagen;* that the collisions which did take place occurred in German waters; and, as against these defendants, the action is vexatious, for these proceedings have been instituted after an undertaking for bail, or equivalent security, had been exchanged between the agents in Germany of the plaintiffs, the owners of the *City of Bradford*, and these defendants, the owners of the *Hagen*, a fact which, if it had been brought to the notice of the vacation judge, when leave to serve notice of the writ out of the jurisdiction was obtained, would have prevented the discretionary power of the Court being exercised in favour of the owners of the *City of Bradford*, that is to say, the owners of the *Hagen* would not have been made parties to the English proceedings. Secondly, there is no necessity for the present proceedings, for the defendants, the owners of the *Hartley*, have commenced an action in rem against the plaintiffs, the owners of the *City of Bradford*, and cross-bail has been given, so that the plaintiffs, as owners of the *City of Bradford*, can proceed by way of counterclaim, and the only object of commencing the present action in personam against the owners of the *Hartley*, and the owners of the *Hagen*, is to enable the plaintiffs, the owners of the *City of Bradford*, to apply for this order for service of the writ upon the owners of the *Hagen* outside the jurisdiction; but, so far as the *Hagen* is concerned, there is a lis alibi pendens relative to the subject-matter of the collision in the German Courts, where proceedings are going on, not only against the *Hartley*, but also against the *City of Bradford*. The proper place for the trial of the action is, therefore, in Hamburg, where evidence has already been given on behalf of the *Hartley*, where evidence from the *City of Bradford* and from the *Hagen* can be conveniently given, and where the owners of the *Hagen* are resident. The Court will, therefore, interfere under its general jurisdiction to restrain oppressive litigation: see the case of *McHenry* v.

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Lewis (1), which was approved and applied in *The Christiansborg* (2), which latter case was followed in *The Jasep.* (3) At any rate, the Court will suspend the present proceedings until the matter is decided by the German Court.

[Reference was made to *The Ida* (4) and to *Thomas* v. *Duchess Dowager of Hamilton.* (5)]

H. M. Robertson, contra. The plaintiffs allege that the collision in question was caused or contributed to by neglect or default in the navigation of both the *Hartley* and the *Hagen.* The defendants, the owners of the *Hartley,* who are within the jurisdiction, have been duly served, and, therefore, the Deutsch-Australische Dampfschiff-Gesellschaft, who are resident out of the jurisdiction, may be served with notice, as being necessary or proper parties to the action within the meaning of Order XI., r. 1 (*g*), of the Rules of the Supreme Court: see *The Duc d'Aumale* (6), where, in a collision action, leave was given to serve notice of a concurrent writ, out of the jurisdiction, upon the owners of a French vessel, the owners of her tug, a British vessel, having been duly served within the jurisdiction. In *The Mannheim* (7) the case of *The Christiansborg* (2) was distinguished, and a guarantee, exchanged between the agents of the owners of a British and a German ship which had been in collision near Rotterdam, was held to be no bar to an action in this country, there having been no arrest in Holland, and there being no legal proceedings pending there. In order that the suit may be deemed vexatious, that is to say, in order that the plea of lis alibi pendens may succeed, it must be shewn that such lis exists; but the letters of guarantee are not equivalent to bail, and it was not until December 6 that legal proceedings were instituted in Hamburg by the owners of the *Hagen* against the guarantors for the *City of Bradford* and the *Hartley,* and that was long after an appearance had been entered in the present action. In no sense can the present proceedings be deemed oppressive, for two out of the three ships involved in the collision are British ships belonging to English companies carrying on business in England, and each of the three vessels concerned alleges that the other two were jointly to blame, and each of these three vessels sustained damage. It is, therefore, obviously convenient that the rights and liabilities of each towards the other two should be determined at one time and by one tribunal. This will be best attained by allowing the plaintiffs' action in this country to proceed.

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(1) (1882) 22 Ch. D. 397.

(2) (1885) 10 P. D. 141.

(3) (1896) 12 Times L. R. 375, 434.

(4) (1860) Lush. 6.

(5) (1886) 17 Q. B. D. 592.

(6) [1903] P. 18.

(7) [1897] P. 13.

Laing, K.C., in reply. The case of *The Duc D'Aumale* (1) is distinguishable, for there the collision was on the high seas between a British vessel and a French vessel which was in tow of a British steam tug. The owners of the British tug having been served in respect of proceedings in personam in England, leave was given to serve notice upon the owners of the French vessel out of the jurisdiction; but here the plaintiffs' vessel, the *City of Bradford*, was not in collision with the German vessel, the *Hagen*, and the collision which did take place was in German waters.

Cur. adv. vult.

Feb. 3. BARGRAVE DEANE J. This is a motion to set aside an order made by the vacation judge, sitting in Admiralty, that service of notice of a writ in an Admiralty action should be made out of the jurisdiction, namely, in Germany, on a German steamer, the *Hagen*, in a collision action brought by the owners of the *City of Bradford* against the owners of the *Hartley* and the owners of the *Hagen*.

The learned judge had the matter before him ex parte, and I have seen the affidavit which was before him, and certainly upon that affidavit, without further materials, he was justified in allowing service of notice of this writ out of the jurisdiction. That, however, was in the nature of an order nisi—although it did not take that form—because the owners of the *Hagen* were not represented before the learned judge, and they are entitled, and always have been entitled, to shew cause why that order was improperly made, and they have now put forward affidavits

(1) [1903] P. 18.

as to certain facts which they say shew that the order ought not to have been made.

The facts, so far as material for the present purpose, are, I believe, not in dispute. A collision occurred in the river Elbe between the British steamer *City of Bradford*, the British steamer *Hartley*, and the German steamer *Hagen*. I do not know the facts of the collision, but I understand that one vessel ran into another, and it is alleged that that was caused by the fault of the third. Each accused the other of being in fault. The facts must be thoroughly gone into, and the sole question before me is whether it is right that the *Hagen* should be brought here into this Court or whether the action should be tried in Germany at Hamburg, where the *Hagen* is, and where I understand that the *Hagen* has now brought an action against the two British steamers. On September 27 the collision took place. On September 30 an action was commenced in this Court by the *Hartley* against the owners of the *City of Bradford*, and on the same day at Hamburg, where the vessels were, the *City of Bradford* and the *Hagen* each of them found sureties in lieu of the bail which would meet any damages which the other might be entitled to recover; but there seems to have been no action at that time brought in Germany. On October 2 there was a writ issued in this Court by the *City of Bradford* against the *Hagen* and the *Hartley*, and on the same day proceedings in Hamburg were commenced in the German Court by the *Hagen* against the *Hartley*, and an order was made that both ships should give security in lieu of bail. On October 3 the vacation judge ordered that service of notice of the writ in the *City of Bradford's* action should be made upon the German vessel in Germany. That notice was served on November 16 upon the *Hagen*. On November 26 the owners of the *Hagen* appeared to that English writ under protest, and on December 6 the *Hagen* commenced an action in Germany against the *City of Bradford* and the *Hartley*—that is to say, the form of the action was an action brought by the sureties in lieu of bail of the *Hagen* against the sureties in lieu of bail of the *City of Bradford* and the *Hartley*.

The result is that there are at this moment pending in this country, and in Germany, actions in respect of this collision between these various ships. Now, how is it that from September 27 until December 6 the owners of the *Hagen*, knowing all about the litigation going on in this English Court, took no action? It seems to me that, as far as this Court is concerned, it is entitled to say that those who commenced the proceedings are to be considered, and if the owners of the *Hagen* did not take any steps in their own country to issue a writ or bring these other two vessels to book, they cannot complain if these other two vessels take precedence and bring them to book in the first instance. Therefore, for these reasons, I uphold the decision of the learned vacation judge, and the motion must be dismissed with costs.

On Appeal:—

March 4, 5. *Laing, K.C.*, and *Arthur Pritchard*, for the appellants (defendants), the Deutsch-Australische Dampfschiff-Gesellschaft, the owners of the *Hagen*.

J. A. Simon, K.C., and *H. M. Robertson*, for the respondents (plaintiffs), the Great Central Railway Company, owners of the *City of Bradford*.

The arguments were the same as in the Court below, except that counsel for the appellants did not press the point as to want of jurisdiction; but insisted that the discretion of the learned judge in the Court below had been wrongly exercised, seeing that the order had been originally made without disclosure of the fact that cross letters of guarantee, in the nature of bail bonds, had been exchanged between the parties in Hamburg.

Reference was made to the cases of *Massey* v. *Heynes* (1); *The Elton* (2); *Croft* v. *King* (3); *Logan* v. *Bank of Scotland*. (4)

Lord Alverstone C.J. This is, to my mind, a case of great difficulty. It has been extremely well argued on both sides, and but for the fact that it is of an interlocutory character, and, therefore, it is desirable to dispose of it at once, I should like to have taken time to consider my judgment.

The difficulty which has pressed upon my mind throughout is that we are really asked to interfere with the discretion of the learned judge. The rule of the Supreme Court under which the question arises is Order XI., r. 1, which is as follows: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." It is not disputed in this case that the *City of Bradford* has a right to bring an action against the *Hartley*, and in that sense it is a proper action, and that, assuming there were two vessels involved in the cause which led to the collision, the owners of the *Hagen* are necessary or proper persons.

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(1) (1888) 21 Q. B. D. 330.
(2) [1891] P. 265.
(3) [1893] 1 Q. B. 419.
(4) [1904] 2 K. B. 495.

If I felt that Bargrave Deane J. had exercised his discretion upon all the facts before him I should have greater reluctance in interfering with his decision, but I do not think he has appreciated the difficulties of the matter or dealt with the case upon all the facts. Certainly I say this, that had the facts been before me I should not have allowed this service to go. With regard to Parker J. I do not think anybody suggests that he exercised his discretion upon the materials which we now have before us. He acted upon an affidavit by Mr. Lewis; and the question, I think, we have to consider is what order we ought to make, having regard to all the facts before us.

I am anxious not to be unduly influenced by the fact that we are dealing with a case in which it is sought to bring persons, who have not come here and whose property is not here, before the jurisdiction of these Courts. As far as that jurisdiction goes we are bound in this Court by the view—and I shall loyally act upon the view—that the Court has jurisdiction; but it seems to me there are materials in this case which ought to make the Court hesitate before making an order which will have the effect of forcing the owners of the *Hagen* to appear as second defendants in this Court in a collision case, the actual collision being between the *City of Bradford* and the *Hartley*, though it may be that the collision was the consequence of the negligent navigation of the *Hagen*. The collision happened on September 27. On September 30 the *Hartley* issued a writ in rem against the *City of*

Bradford. So far as the necessity of protecting herself against the *Hartley* is concerned, it is plain that the *City of Bradford*, having got bail in that action, required no further proceeding; but it was seen that to counter-claim in that action would not enable them to bring the *Hagen* before the Court. Therefore, instead of counter-claiming, the owners of the *City of Bradford*, on October 2, commenced proceedings in personam against the Burnett Steamship Company (the *Hartley*) and against the Deutsch-Australische Dampfschiff-Gesellschaft (the *Hagen*). In that action they made application for leave to serve notice of the writ upon the owners of the *Hagen.* I confess it does strike me that, although that was a perfectly legitimate step to take, the real object, and the only object, of the proceedings in personam was to drag the German company here. It is perfectly legitimate, but I think it is not a circumstance to be left out of consideration when we are dealing with the question whether the Court, in the exercise of its discretion, should give leave for that step to be taken. In addition to that, if the matter had been before me in the first instance, I should have attached much more importance than Bargrave Deane J. appears to have done to what happened immediately after the collision. Mr. Lewis, in his affidavit, says: "The defendant company, the Deutsch-Australische Dampfschiff-Gesellschaft, carries on business at Hamburg, in the German Empire, but is a necessary or proper party in this action, inasmuch as the plaintiffs allege that the said collision was caused or contributed to by neglect or default in the navigation of the *Hartley* and the *Hagen*." Now, on December 11 Mr. Roberts' first affidavit is made, and it discloses documents which are the first matters, I think, that have seriously to be considered. On September 30 the representative of the *City of Bradford* asked the representative of the *Hagen* "to inform me by return in what manner you will give security for the steamship *Hagen*, either to me or my owners for their claims, as otherwise, acting on instructions from my owners, I will be compelled to arrest the ship." That is a distinct intimation of the plaintiffs' intention to arrest the *Hagen* at Hamburg unless security is forthcoming. The reply was as follows: "We received your favour of to-day, and beg to inform you that the collision . . . . was not brought about by incorrect manœuvring on the part of our steamship *Hagen*. . . . . We are nevertheless prepared to give the security demanded, if you on your part will give a similar undertaking on behalf of the *City of Bradford* as regards the steamship *Hagen*." On October 1 Mr. Rover, for the *City of Bradford*, replies: "I beg to inform you that I, without prejudice, however, to the question of blame, undertake personal bail for the captain and the owners of the steamer *City of Bradford*." We have also got, upon October 2, the formal document relating to the preliminary proceedings taken in the Court at Hamburg. Now it is said by counsel for the respondents that it only amounts to an undertaking to give bail should necessity arise. I agree with that observation, and if we were dealing with the same question as arose in *The Mannheim* (1) that would be a very material fact, but in my judgment that does not exclude the necessity for considering the matter from the point of view from which we are now considering it.

Now, upon the affidavit of Mr. Lewis being filed, the defendants entered an appearance under protest and this motion was brought. Mr. Roberts' affidavit is very material. He sets out the proceedings instituted in the Lower Court of Hamburg on behalf of the Deutsch-Australische Dampfschiff-Gesellschaft against the owners of the *Hartley*, and says he is informed and believes that the evidence of the master and crew of the *Hartley* has been given in those proceedings. He also refers to the action in rem instituted in the Admiralty Division by the *Hartley* against the *City of Bradford*, says he is informed that the *City of Bradford* and the *Hagen* were not in collision with each other, and continues: "As between the owners of the *Hartley* and the *City of Bradford*, and so far as the interests of the owners of the *City of Bradford* were concerned, I submit there was no necessity for a second action to be brought by the owners of the *City of Bradford*, as the owners of that vessel could have counter-claimed in the ordinary way for the damages sustained in the collision between those vessels. I further submit there was nothing to prevent the owners of the *City of Bradford* in that action raising the defence, if so advised, that the collision

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(1) [1897] P. 13.

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between the *City of Bradford* and the *Hartley* was due wholly or partly to the navigation of the *Hagen*, and further that, the undertakings given in Hamburg by the agents of the owners of the *City of Bradford* and the owners of the *Hagen* respectively not having been withdrawn, the owners of the *City of Bradford* would be in no way damnified, but on the contrary they would be at an advantage by being able to proceed against the *Hagen* in Hamburg." The affidavit concludes: "To the best of my information and belief the application to join them (the owners of the *Hagen*) as a party was irregular and improper on many grounds. It was not bona fide; it was oppressive and vexatious and an abuse of the practice of the Court; it was not solely made in the interests of the owners of the *City of Bradford;* the application was based on an improper affidavit which did not state all material facts to the Court, and was a breach of good faith and of the understanding on which the undertakings were given." I confess I have a little suspicion that there is some ground for that suggestion. Mr. Lewis answered that on January 6, but practically all he says is that two out of the three ships which were concerned in the collision are English ships belonging to English companies, carrying on business in England and having English solicitors; that on the ground of convenience it is highly desirable that the questions arising in this litigation should be settled in England; and that the said defendants are necessary and proper parties to the action brought by the plaintiffs against the *Hartley*. What I think is of great importance is that there is no answer to the other part of the affidavit. It is unfortunate that a fuller answer was not given, when there was a direct challenge by Mr. Roberts.

In the circumstances ought the learned judge to have made the order giving leave to serve the notice of the writ on the defendants in Germany? It is not now denied that there is jurisdiction. The case of *The Duc d'Aumale* (1) establishes that beyond doubt. The only question, therefore, is as to the exercise of the discretion. In the case of *The Christiansborg* (2) the existence of a document of guarantee somewhat similar to those in the present case was held to be sufficient to make the Court

(1) [1903] P. 18.

(2) 10 P. D. 141.

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of Appeal stay an action against a ship in this country, upon the ground that the guarantee amounted to a bargain that the ship should be released and become a free ship. In that case an action had been commenced abroad, and it is true, as counsel for the respondents pointed out, that that case is not a direct authority as to the proper order to be made if the application is one to stay an action properly brought against a foreign ship in this country. In the same way, I think *The Mannheim* (1) is not an authority to the extent that counsel for the respondents pressed it in their favour. *The Mannheim* (1) was a case in which a foreign ship was arrested when she came to this country, and the action was properly commenced in this country, and Sir Gorell Barnes refused to stay the action, holding that a guarantee given abroad was, in the circumstances, no bar to an action being brought here. It seems to me that the considerations which operated in that case have not got anything like the same force when you are dealing with a mere question of discretion.

I therefore come to the conclusion that in the circumstances it was not right to force the defendants, who, within a reasonable time, had acted upon the undertaking given, and had taken proceedings in Hamburg, practically to abandon those proceedings and come and try the case here. If I had felt that Bargrave Deane J. had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to shew that he did. I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised. Where you have got competent parties taking steps to enforce their rights in a foreign civilized country—proceedings taken practically in accordance with understandings—we ought not to allow notice of this, to a certain extent, colourable and unnecessary writ to be issued, not for the purpose of enforcing the rights of the *City of Bradford* against the *Hartley*, but in order to enable these defendants to be brought before the Court. It is not disputed that, if the *Hagen* were the only ship alleged to be to blame, the plaintiffs could not bring these defendants here, and, in my

(1) [1897] P. 13.

opinion, the Court, having regard to the place of the collision and the other circumstances of this case, ought to be slow to force the German defendants to come here. With reluctance I come to the conclusion that I should not have made the order, and that Bargrave Deane J. did not exercise his discretion upon the facts. In effect he decided the matter solely upon the ground that there had been some little delay in commencing proceedings in Hamburg. I think this appeal must be allowed.

FARWELL L.J. I agree. I naturally have some hesitation in differing from Bargrave Deane J. on such a point, but in my view, with all respect to him, he has not rightly appreciated the effect of the authorities bearing upon the case.

During these present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI., and we have had many authorities discussed and fully considered by the Court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Société Générale de Paris* v. *Dreyfus Brothers* (1), that "it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction." The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application. I may

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(1) (1885) 29 Ch. D. 239, at p. 242.

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dismiss the second and third of those heads, because, in my judgment, they do not apply here. I think it would be hard to impute to the deponent of the affidavit the knowledge of the effect of those two cases in Admiralty, which the learned judge of the Court below appears not to have adopted. One point, therefore, is whether the learned judge was right in exercising his discretion as he did.

The initial difficulty is that reliance has been placed on two cases which in my judgment have no application, namely, *The Mannheim* (1) and *The Christiansborg*. (2) It is one thing to say that a defendant who comes here to stop a duly commenced action must shew some equity against the plaintiff disentitling him to pursue remedies which prima facie he is entitled to pursue; it is quite another thing to say that the Court, in exercising its own discretion as to whether it will allow an action which cannot be commenced at all without its permission to be so commenced, should give that permission. The lis alibi pendens ground upon which the jurisdiction on which *The Christiansborg* (2) and *The Mannheim* (1) really depend is well set out by the Court of Appeal in *Peruvian Guano Co.* v. *Bockwoldt.* (3) Lord Lindley says: "A motion is made to compel the plaintiff to elect. It is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter. He must go a step further, and shew that there is vexation in point of fact—that is to say, that there is no necessity for harassing the defendant by double litigation." It is obvious that that does not apply to cases where the plaintiff in England is the defendant in a foreign Court, because there is no question of his commencing double litigation so as to harass, and therefore no personal equity against him, but the consideration that there is a suit pending elsewhere is a proper one for the judge who is debating whether he shall exercise his discretion in allowing service out of the jurisdiction under Order XI. I think here, if Parker J. had had brought to his attention those undertakings in lieu of bail bond, and the statement of Baggallay L.J. in *The Christiansborg* (2) that there is no distinction in principle between a ship being released on bail in the ordinary form and being released by virtue of an agreement come to between the two owners or their representatives, he would have felt himself bound to consider that there was that which is equivalent to the commencement of an action in a foreign Court. Having that before him, and considering the recent date of the occurrence, I have very little doubt that he would have said: "The proper tribunal prima facie is the German tribunal; the collision took place there; it will depend upon German law; and there is no reason at present for harassing the foreigner by bringing him here." It would be quite another thing if the foreigner had not commenced any proceedings at all, or had allowed a considerable time to elapse before he had commenced proceedings, but inasmuch as the proceedings were initiated by this agreement in lieu of bail bond which was actually followed up by the German equivalent for a writ on December 6, the discretion in this case ought not to be exercised by allowing service out of the jurisdiction. In the case before Gorell Barnes J.—*The Mannheim* (1)—it is to be observed that two years had elapsed between the giving of the bail bond and the actual commencement of the proceedings, and it is obvious that the Englishman who has a right of action which he may enforce, if the Court will permit him, by issuing a writ in this country, cannot be expected to wait an indefinite period. In the present case I think there is not any question of any lapse of time which is material, and I agree with the Lord Chief Justice that this order ought to be discharged.

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(1) [1897] P. 13.
(2) 10 P. D. 141.
(3) (1883) 23 Ch. D. 225, at p. 232.

KENNEDY L.J. I am of the same opinion. It appears to me a case of some difficulty, and especially upon the ground that it may be said that this is a decision in a case in which the jurisdiction of this Court is invoked to interfere with the statutory discretion of the judge below; but in my opinion Parker J. had not before him originally the material facts, and it appears to me, with great respect, that the matter has been dealt with by Bargrave Deane J. without full regard to the

(1) [1897] P. 13.

circumstances of the case as they have been developed in argument before us.

There is no doubt that there was jurisdiction under Order XI., r. 1, sub-s. (*g*), to bring in this foreign defendant. It was a case to which, had all the parties been originally here, and served here, the owners of the *Hagen* might be treated as a proper party; and as there had been due service of the writ upon the persons who represent the *Hartley*, upon their being served there was jurisdiction to add the owners of the *Hagen*, although the collision arose within foreign territory, and the persons sought to be added were foreigners. But, assuming that there was jurisdiction to make an order, the Court has to decide whether, under the initial words of Order XI., it was a case in which the jurisdiction, though legitimate, ought to be, as a matter of discretion, exercised in favour of the owners of the *City of Bradford*. All the facts have to be considered. There would be no jurisdiction unless the party could be described as at least a proper party to be added as a defendant, and you have further got to see that all the circumstances make for the exercise of the discretion in favour of the application. You have to consider what may be called the comparative advantage in furtherance of justice to all parties; and, in the present case, amongst the circumstances there is one which was not before Parker J., and which seems to me to be material. It is this, that the plaintiffs had exchanged with the defendants now sought to be added, on September 30, before the application to Parker J., an undertaking to give security in lieu of bail, for the purpose of rendering arrest unnecessary. If that was a bona fide proceeding, really intended between business men as the initial stage of litigation, there was practically a commencement of an action. It is right to guard the expression by saying "practically," because for some purposes it may not be treated as equivalent to actual arrest.

As the Lord Chief Justice and Farwell L.J. have pointed out, we have to decide here as to the right of a person to stop proceedings which require no discretion for their initial stage, but here there has to be a discretion exercised, of which the Court cannot divest itself; and discretion means the consideration of

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all the material facts. We know now that proceedings, really without any great delay, were taken in the German Courts, and that on December 6—which was not undue delay—proceedings were instituted there, first, against the guarantors of the *City of Bradford;* and secondly, on the same day, against the guarantors of the *Hartley*. So all the three parties were in ordinary course of being brought before the German Court, the evidence of witnesses taken, and the case on its way to trial. In those circumstances it seems to me it is impossible to say that it is not a circumstance to be considered in the exercise of discretion, that the collision was in the river Elbe, and a further circumstance that the party whom the plaintiffs seek to add is a foreigner. Leave being required, it seems to me clear that had all the facts come before me as a judge of first instance as they have come before us to-day I should not have made this order.

It is said that the rights of the parties cannot be adjusted so well in Germany as here. I am not at all sure that the rights will not be as well determined there as here, and it is by no means necessarily inflicting injustice upon the present plaintiffs in the English action that the owners of the *Hagen* are not joined, because, upon the materials before us, it seems to me they may fight out their battle with the *Hartley* here without the inconvenience that a triangular battle often involves.

Appeal allowed with costs.

Solicitors for appellants (defendants), the Deutsch-Australische Dampfschiff-Gesellschaft: *Pritchard & Sons.*

Solicitor for respondents (plaintiffs), the Great Central Railway Company: *D. H. Davies.*

T. L. M.

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[IN THE COURT OF APPEAL.]

THE CHARLOTTE.

Admiralty—Collision—Damage to Cargo—Action against Wrong-doer by Owners of Goods—C.i.f. Contract—Buyers not Owners at time of Loss—Payment of Invoice Price by Buyers—Settlement of Loss by Underwriters with Buyers—Subrogation—Right of Underwriters to recover in name of Sellers.

In pursuance of a contract note, providing for cost, insurance, and freight of a parcel of wood goods, the sellers in Christiania shipped the goods under a bill of lading to the order of their London agents, who forwarded it to the buyers at Exeter, and authorized them to retain it against their acceptance at four months, or cash less discount. The buyers elected to pay in cash; but their country cheque posted to London was not credited as paid until three days after the carrying vessel had been in collision with another vessel and the goods had been damaged. The carrying vessel put into a port of distress, where the goods were sold on behalf of underwriters, with whom the sellers' agents had effected a policy for the benefit of whom it might concern. The underwriters subsequently paid the buyers as for a total loss, and the sellers retained the proceeds of the cheque representing the invoice price of the goods.

In an action of damage by collision brought against the other vessel by the owners of the goods in the carrying ship, the names of the buyers were given as plaintiffs, but the Court held that the buyers had no right of action, as the property in the goods was not vested in them at the time of the collision. By leave the names of the sellers were added as plaintiffs, and, the other vessel having been found alone to blame, the amount of the damage was referred to the registrar, who rejected the claim of the sellers suing on behalf of the underwriters on the ground that, as the sellers had been paid by the buyers the sound value of the goods, they had not sustained any loss in respect of which subrogation could arise. This report was confirmed by the judge sitting in Admiralty:—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), reversing the decision of the Court below, that the passing of the cheque from buyers to sellers did not deprive the underwriters of their right to recover the loss from the wrong-doer in the name of the sellers, who were the owners of the goods at the time of the collision.

APPEAL by plaintiffs, owners of cargo lately laden on board the barque *Fernando*, against a decision of Bargrave Deane J. rejecting their claim for damage sustained through a collision with the barque *Charlotte* owned by the defendants.

The case raised the question whether underwriters could avail themselves of the doctrine of subrogation, to recover from the wrong-doer the amount of the damage sustained, where they had paid, as for a total loss, the buyers of cargo, who were not the owners of it at the time of the collision, and the buyers had paid the sellers, who were the owners of it, the sound value of the goods.

Under a contract note, dated December 10, 1906, R. W. & F. C. Sharp, Limited, of Exeter, bought of Westye, Egeberg & Co., of Christiania, through their London agents, F. Briesemann's successors, a parcel of 160 to 170 standards of wood goods, for shipment at Christiania "if possible early March . . . . prices as are quoted below per St. Petersburg nominal standard, cost, freight, and insurance to Exmouth Dock . . . . payment by approved acceptance to sellers' or agents' drafts, according to agents' option, payable in London at four months from date of bill of lading, or at buyers' option, in cash less 2½ per cent. discount, and in exchange for the same, and policy of insurance, and if any freight advance be given, same to be paid for by approved acceptance to sellers' or agents' drafts, according to agents' option, payable in London at one month from date of bill of lading, in exchange for shipping documents as above . . . . Marine insurance to be covered by sellers or their agents on Lloyd's terms."

On January 30, 1907, Westye, Egeberg & Co. chartered the Norwegian barque *Fernando* to proceed to the charterers' loading place at Christiania, and, having taken in the cargo of wood, deliver the same at Exmouth Dock on being paid the agreed freight. On March 5, F. Briesemann's successors wrote from London to R. W. & F. C. Sharp, Limited, Exeter, enclosing shipping documents per *Fernando* for a cargo of wood goods "which we authorise you to retain against your acceptance of enclosed 1992*l.* 8*s.*, or cash less 2½ per cent. discount for 1892*l.* 8*s.*, to be sent to us in due course, otherwise the bill of lading and other documents to be considered as remaining at our disposal and are to be sent back to us on demand. Requesting you to acknowledge receipt of the enclosures and saying at the same time how you elect to pay." The enclosures were—(1.) invoice, giving the price, including 100*l.* advance freight at 1992*l.* 8*s.*; (2.) bill of lading by which the goods were to be delivered "unto F. Briesemann's successors, London, qua agents, or order, he or they paying (the agreed freight), and other conditions as per charterparty . . . . As advance on the freight received 100*l.* Insurance paid"; (3.) policy of insurance to follow when signed. By the policy, dated London, March 7, Price, Forbes & Co., of London, as agents "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all" insured the wood goods from Christiania to Exmouth Dock at a valuation of 2080*l.*

On March 12, R. W. & F. C. Sharp wrote to F. Briesemann's successors, "We are in receipt of your favour enclosing policy of insurance. We now enclose you cheque 1845*l.* 2*s.* in payment of the cargo per *Fernando*, and shall be glad of your receipt. Invoice, less freight, 1892*l.* 8*s.*, less discount 47*l.* 6*s.*, 1845*l.* 2*s.* We will send cheque, to cover freight advanced, at a later date." The cheque for 1845*l.* 2*s.*, dated Exeter, March 12, was drawn on the Wilts and Dorset Banking Company, Limited, to the order of F. Briesemann's successors. It was indorsed by them and crossed Parr's Bank, Limited, Lombard Street, and was credited as paid at Exeter three days later.

On the same day (March 12), about 8.30 P.M., a collision occurred in the North Sea between the *Fernando* and the *Charlotte*. On March 16, Price, Forbes & Co. wrote to R. W. & F. C. Sharp, "We regret to have to advise you that Lloyds' agent at Ymuiden reports that this vessel (the *Fernando*) has been towed into that port after collision with the Norwegian barque *Charlotte*. We are taking the necessary steps assuming that you will wish us to take the matter in hand; but we shall be glad of your confirmation in due course. We fear the ship will require somewhat extensive repairs before she can proceed." On March 18, the secretary of the Salvage Association, London, was advised from Amsterdam that the cargo would be seriously depreciated if the damaged part was left too long in the vessel, and, on April 15, the Salvage Association received from Amsterdam, and forwarded to Price, Forbes & Co., a telegram stating that the vessel would be condemned, and advising "sale by auction for account of underwriters on cargo." On April 19, Price, Forbes & Co. wrote to R. W. & F. C. Sharp, "We assume that in the circumstances you are willing to accept a total loss under your policy." On April 20, R. W. & F. C. Sharp wrote expressing their willingness "to accept a total loss under the policies of cargo and freight advance."

On May 1, a writ was issued in the name of the owners of the cargo as plaintiffs, in an action of damage by collision, against the owners of the *Charlotte*, and the address of the plaintiffs was therein stated to be at Exeter, in the county of Devon, being the address of R. W. & F. C. Sharp, whose names were given as plaintiffs in reply to the defendants' demand. On May 2, Price, Forbes & Co. wrote to R. W. & F. C. Sharp that "We have to-day completed settlement of a total loss of this cargo, and payment will be due from underwriters within the next few days. We enclose credit note herewith. We have also pleasure in enclosing cheque for 2059*l.* 4*s.*, this of course being 'without prejudice' until we are in cash from underwriters." On May 10, F. Briesemann's successors wrote to Westye, Egeberg & Co., "The cargo per *Fernando* has been sold in Holland by the underwriters at Lloyds, who have paid Messrs. Sharp their claim for total loss, and Messrs. Sharp have asked us to collect the amount of the freight advance, 100*l.*, from the Christiania Soforrikringsselskab. We shall feel much obliged if you will do this for them and enclose policy." This request was complied with, and, on June 4, R. W. & F. C. Sharp wrote to F. Briesemann's successors acknowledging cheque 98*l.* 14*s.* 9*d.* "in payment of freight advanced *Fernando*." On June 18, by their statement of claim, the plaintiffs, as owners of the cargo of the Norwegian barque *Fernando*, alleged that "in consequence of the collision the *Fernando* was seriously injured and made water and her cargo was damaged and a portion thereof had to be jettisoned for the safety of the ship and cargo and salvage services were rendered necessary to get the vessel and her cargo to a port of refuge." On July 5, at the trial of the action before Bargrave Deane J., the defendants objected that the property in the cargo had not passed to R. W. & F. C. Sharp at the time of the collision and that they were not entitled

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to sue. The learned judge upheld the objection, but gave the plaintiffs leave to appeal. On July 9 the learned judge ordered that "plaintiffs be at liberty to amend the writ of summons herein by adding the address of Westye, Egeberg & Co. as plaintiffs to that of R. W. & F. C. Sharp, the present plaintiffs, on the consent of the said Westye, Egeberg & Co. in writing being filed, and that their name and address be furnished by the plaintiffs to defendants' solicitors." On July 12 the writ was amended, and by their amended defence the defendants, inter alia, denied "that the plaintiffs suing, viz., R. W. & F. C. Sharp and Westye, Egeberg & Co., or either of them, are or were at any time material the owners of the cargo or entitled to sue. . . . . If Westye, Egeberg & Co. have suffered any damage which is denied the defendants denying liability bring into Court 40*s*. and say that it is sufficient to satisfy any claim they may have."

Evidence as to the merits having been heard by the learned judge, assisted by two of the Elder Brethren of the Trinity House, he, on July 27, pronounced the collision to have been occasioned by the fault of the *Charlotte*, and condemned the defendants, and the barque, under arrest by the marshal, in the plaintiffs' claim for damage, with special directions as to costs, and referred the damages to the registrar, assisted by merchants, to report the amount thereof. On July 31 the learned judge ordered the *Charlotte* to be sold, and, under that order, the proceeds, amounting to 439*l*. 3*s*. 2*d*., were paid into Court. On December 13 the plaintiffs' claim came before the registrar, amounting to 867*l*. 7*s*. 1*d*., made up of 175·42 standards of wood 2118*l*. 10*s*. 8*d*., less proceeds of sale 1300*l*. 5*s*. 7*d*., and adding sundries 49*l*. 2*s*. On December 16, the registrar reported that no question of amount was in dispute, and continued: "I am of opinion that Messrs. Westye cannot recover damages. In order to give them a right to pecuniary compensation there must be a pecuniary loss. Messrs. Westye have not suffered any pecuniary loss and, therefore, are not entitled to compensation. If they were awarded damages they would receive not restitutio in integrum, but something more. It was not of course concealed that as the cargo was insured for more than its invoice value, the buyers were not losers by the payment they made; on the contrary, they were gainers; but all I am concerned with in this reference is to ascertain whether Messrs. Westye have suffered any damages, and the mere statement of the facts shews that they have not, or, at the most, nominal damages, which are covered by the payment into Court. With the motive which induced the buyers to pay for the cargo and not make any claim I have nothing to do. It was, however, contended by counsel for Messrs. Westye that Messrs. Westye were trustees in the proceedings for Messrs. Sharp, and were, therefore, entitled to damages; but Messrs. Westye are sellers, who have been paid by the buyers, who have made no claim of any kind against the former, nor is there any question of subrogation as between the underwriters and Messrs. Westye, and no kind of fiduciary relationship exists between the buyers and sellers."

On December 30 the solicitors for the plaintiffs delivered their petition in objection to the report of the registrar and prayed the Court to order the report to be reformed. On January 14, 1908, the defendants, in answer to the petition, prayed the Court to confirm the report, and, on February 17, the following judgment was delivered by—

Bargrave Deane J. I think the registrar is perfectly right in this case. You have to take the facts as they are, not as they might have been if you had behaved differently. It appears to me that, from beginning to end, this case has been conducted in the wrong way. It began by there being an action by Sharp against the owners, then it was amended. Sharp never having been the owner of the cargo never had any rights in that respect, and, therefore, could not subrogate any right to the underwriters. Messrs. Westye, Egeberg & Co. were the owners of the cargo, they had rights, and they would be entitled, if they had not been fully paid, to subrogate those rights so that they could sue on behalf of the underwriters. But they have not received the underwriters' money, they have received the full purchase value of these goods from Sharp, and there is no privity between them and the underwriters at all, you cannot mix them up. If different circumstances had arisen, if different arrangements had been made, possibly the position might have been different; but I have to deal with the facts as they are, and, dealing with the facts as they are, I say that Sharp is out of the case altogether, he cannot sue for anybody else. With regard to Westye, Egeberg & Co., they have suffered no damage, and, therefore, having suffered no damage, they have got nothing they can pass on to anybody else, and there is no privity between them and the underwriters. In my opinion the registrar was perfectly right, and the plaintiffs' petition must be dismissed with costs.

On appeal:—

1908. March 9. *Aspinall, K.C.*, and *Dawson Miller*, for appellants (plaintiffs), owners of cargo lately laden on board the *Fernando*. The writ in the present action was issued in the usual form in the name of the owners of the cargo, and on demand by the defendants for the names of the plaintiffs the names of R. W. & F. C. Sharp were given. As a matter of fact, the collision between the *Fernando* and the *Charlotte* having occurred at about 8.30 P.M. on March 12, 1907, the cheque from the buyers at Exeter to the sellers' agent in London was in transit, and, therefore, the learned judge held that R. W. & F. C. Sharp had no right of action, as no property had then passed to them, but he gave the plaintiffs leave to amend the writ by adding the address of Westye, Egeberg & Co. as plaintiffs to that of R. W. & F. C. Sharp. The question as to which ship was in fault for the collision was then gone into, and the learned judge found that the *Charlotte* was alone to blame. Thereupon a claim arose against the wrong-doers in respect of the damage to the cargo in the carrying ship for the benefit of whom it might concern, that is to say, for the benefit of those who in fact suffered the loss.

It is in evidence that the news that the *Fernando* had been towed into Ymuiden did not reach London until four days after the collision happened, and the buyers, R. W. & F. C. Sharp, honestly thinking that the cargo was theirs, applied to the underwriters, and were paid as for a total loss, whilst Westye, Egeberg & Co. were allowed by R. W. & F. C. Sharp to retain the invoice price of the cargo, as Messrs. Sharp had in exchange the benefit of the policy of insurance. By the terms of the contract note the insurance was "to be covered by sellers or their agents," and the policy is "in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain." It is not disputed that the cargo, which as it turns out was at the time of the collision the property of Westye, Egeberg & Co., was damaged to the extent of 867*l*. 7*s*. 1*d*., and that it was sold on behalf of those interested, that is to say, the underwriters, at the port of distress to avoid the expense of shipment to its destination. It is submitted, therefore, that the learned judge was wrong in holding that Westye, Egeberg & Co. were not entitled to recover, whether on behalf of R. W. & F. C. Sharp or, which comes to the same thing, directly on behalf of the underwriters; for whichever way the matter is regarded the action is in fact brought for the benefit of the underwriters, who have paid as for a total loss, but the effect of the finding of the learned judge is to give the benefit of the policy of insurance to the defendants, the wrong-doers.

[They were stopped by the Court.]

Scrutton, K.C., and *A. D. Bateson*, for respondents (defendants), owners of the *Charlotte*. On July 5, 1907, after hearing counsel on both sides, Bargrave Deane J. pronounced that the plaintiffs R. W. & F. C. Sharp had no right of action, no property having, at the time of the collision, passed to them; but the learned judge gave the plaintiffs leave to appeal. The time for appealing from that decision has long since expired, and the appeal is therefore barred: *In re Coles and Ravenshear*. (1) In that case Collins M.R., adopting the view of the late James L.J., said that "a party has a vested right in an order of the Court in his favour," and that is the position here, so that the question whether R. W. & F. C. Sharp have, in the capacity of cargo owners or otherwise, any rights as plaintiffs cannot now be discussed.

On the facts, payment not having been made in the terms of the contract note by approved acceptance to sellers' draft, R. W. & F. C. Sharp had no right to retain the bill of lading: *Shepherd* v. *Harrison* (2); and when they did exercise their election and send a cheque the collision had occurred, so that, as they had not at that time done all that was incumbent upon them to vest the property in them, the property had not passed—see per Cotton L.J. in *Mirabita* v. *Imperial Ottoman Bank* (1)—and therefore R. W. & F. C. Sharp could not sue, though the sellers could; but Westye, Egeberg & Co. were paid the sound value of the cargo, and R. W. & F. C. Sharp accepted a total loss under the policy, the result being that, on the inquiry before the registrar, Westye, Egeberg & Co. were unable to shew that they had sustained any damage, and the claim could not be maintained by the underwriters in the name of Westye, Egeberg & Co., for the underwriters had not paid them. The claim of Westye, Egeberg & Co. was therefore rightly rejected.

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(1) [1907] 1 K. B. 1, at p. 5.

(2) (1871) L. R. 5 H. L. 116.

[The case of *Castellain* v. *Preston* (2) was referred to.]

Lord Alverstone C.J. I am unable to follow the reasoning upon which the respondents succeeded, in the Court below, in satisfying the learned judge that the appellants were not entitled to more than nominal damages. As I understand the order of July 5, it merely pronounced that the plaintiffs R. W. & F. C. Sharp had no right of action. That, if anything, meant that those plaintiffs alone had no right of action. The learned judge subsequently gave the plaintiffs liberty to amend the writ of summons by adding Westye, Egeberg & Co.

I should have thought, speaking for myself, that this case was quite different from *In re Coles and Ravenshear* (3), where the Court of Appeal held—with some reluctance, no doubt—that a mistake of counsel as to the effect of an order was not a special circumstance to justify the Court of Appeal in extending the time for appealing. I should feel bound by that decision, but in my opinion it has no relation to the point in this case. Counsel for the respondents say that you cannot move a step now without getting rid of the order of July 5. In my judgment that is assuming too much in favour of the defendants. I think the outside that can be said as to the decision of

(1) (1878) 3 Ex. D. 164, at p. 172.

(2) (1883) 11 Q. B. D. 380.

(3) [1907] 1 K. B. 1.

the Court was that Sharps were not entitled to recover alone. Whether that was right or wrong I do not think matters very much. It certainly does not prevent this Court from saying, if necessary, that Sharps' name should be added, when there are other plaintiffs before the Court.

I now come to the merits of this case. The facts are these: A c.i.f. contract; undertaking or contract to pay by acceptance of bill or cash less discount; and I should rather agree with counsel for the respondents that the earliest point at which property passed was when the cheque was received, or cashed some three days later. I am aware that there may be an argument the other way. Therefore, at the time of the collision, Westye, Egeberg & Co. were the owners of the goods. They could sue for the damage done, and had a right to look to the underwriters; and I fail to understand the meaning of the learned judge in the Court below when he said: "With regard to Westye, Egeberg & Co. they have suffered no damage, and, therefore, have got nothing they can pass on to anybody else, and there is no privity between them and the underwriters." To my mind that was, for the moment, an omission to observe that Westye, Egeberg & Co. were themselves unpaid vendors; that they had made a c.i.f. contract for the benefit of Sharps, and that they had taken out the policy and, as counsel pointed out, had clean bills of lading which preserved the property in them until events happened which had not happened at the time of the collision. Then it is said that because Westye, Egeberg & Co. received a cheque for 1845*l.* 2*s.* on March 15, and cashed it, therefore Westye, Egeberg & Co. cannot sue in their names for the benefit of whom it may concern. I asked counsel for the respondents whether they had any authority for that proposition, and all they said was that if it pleased Sharps, for reasons best known to themselves, to pay the money, that prevents Westye, Egeberg & Co. from being able to sue upon Sharps' behalf, or to sue in their own name for the benefit of the people who paid. I can see no legal principle upon which that proposition can be maintained, and no authority has been cited to us in support of such a proposition. Therefore it seems to me that this action being in the name of the owners of the cargo, when the name of Messrs. Sharp is given at first, when objection is taken that the property had not passed to them, and when the names of other plaintiffs are added, then the question is whether Westye, Egeberg & Co. have the right to sue, either for themselves or for the benefit of persons who have the real interest; and it seems to me that the mere passing of the cheque cannot be held to deprive the underwriters, who had to pay, of their right to recover in the name of the vendors who were the owners of the cargo at the time of the collision. I think the appeal should be allowed with costs.

FARWELL L.J. I agree, but I do not in any way depart from what I said in the case of *In re Coles and Ravenshear* (1), which has been cited to us but has nothing to do with this case. Bargrave Deane J. simply decided that Sharps alone could not recover. He did not strike out the name of Sharps. Westye, Egeberg & Co. were added. Underwriters are entitled to any damages that may be recovered against a wrong-doer in respect of a collision, and for that purpose they are subrogated to the rights of the persons insured. Any arrangement as to payment between vendor and vendee cannot deprive the underwriters of that right of subrogation. I agree that the appeal must be allowed.

KENNEDY L.J. I am of the same opinion. Here is an ordinary contract of sale—a c.i.f. contract—which is to be fulfilled by the shipment of cargo, in accordance with the contract, from Christiania to be delivered in London, the bill of lading being drawn by the seller, the shipper, in favour of London agents, qua agents, because by the terms of the contract payment is to be made in London to those agents; and therefore the sellers retained, to that extent, the dominion over the property which, if they had made the bill of lading without any condition, simply a bill of lading for delivery of the goods to the immediate buyer, they would not have retained. The cargo on its way is damaged, and the underwriters agree to pay as for a total loss. At the time of the happening of the loss payment was being made to the London agents, a cheque having been remitted through the post, an hour or so before, by the buyer to the agents; but I will assume that the property had not passed to Messrs. Sharp at the time of the loss. In that case, as it seems to me, Westye, Egeberg & Co. had a right of action for some loss, which it is now agreed may be treated as a total loss, against the underwriters.

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(1) [1907] 1 K. B. 1.

I confess I am a little surprised that, on the *Charlotte* being found alone to blame, any further question between business men should have arisen; but it was held by Bargrave Deane J. that the buyer could not sue, standing alone, the policy having been taken out by Westye, Egeberg & Co.; that, the property not having passed at the time of the suit, the persons to sue upon the policy ought to be Westye, Egeberg & Co., and as Westye, Egeberg & Co. were not plaintiffs, on the pleadings as they stood, he gave judgment against the then plaintiffs. What happened then? There was no striking out of those plaintiffs, but the judge gave leave to add further parties. I find from the registrar's report, which I assume is correct, that the case was revived, Westye, Egeberg & Co., of Christiania, being added as plaintiffs. It is not a substitution of Westye, Egeberg & Co. for Messrs. Sharp, but the addition of a person or persons as plaintiffs, who, I assume, were considered by the learned judge to be necessary, according to our law, to give a right to recover against the *Charlotte*, for those whom it might concern. Then the matter goes before the registrar, who, in his careful report, comes to the conclusion that Westye, Egeberg & Co. have no right of action because they have received from Messrs. Sharp since the loss what Messrs. Sharp ought to have paid to them under the contract.

I am unable to understand upon what grounds those who represent the wrong-doers can successfully argue that because Westye, Egeberg & Co. have, as a matter of fact, had the transaction carried out by the payment of that cheque some days after the collision, Westye, Egeberg & Co. have in some way lost their rights. If they are the proper parties to say, "This was our cargo that was lost, pay us the damage," can it be any answer to say, "You have been paid by the vendees, who,

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relying upon the insurance for the benefit of whom it might concern, have sent the money to you, as it were, in advance"? I confess I am unable myself to understand that reasoning. I do not see what the legal foundation for that is—how it can be said that the wrong-doers can say, "Because the vendee has paid you, and relies upon your giving him the benefit of the policy, we have not anything to pay you for having damaged your cargo." I am further of opinion that the decision which has been cited with regard to amendment does not apply to such a case as this, where there has been the addition of a plaintiff in the way set forth in the registrar's report.

Appeal allowed, with costs here and below. Order for payment out of money in Court to plaintiffs.

Solicitors for appellants (plaintiffs): *William A. Crump & Son.*
Solicitors for respondents (defendants): *Stokes & Stokes.*

T. L. M.

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[IN THE COURT OF APPEAL.]

THE VENTURE.

Admiralty—Ship—Possession—Sale—Claim to Share of Proceeds in Court—Evidence.

In an Admiralty action of possession, instituted by the administratrix of the deceased registered owner of a yacht, the vessel was, by consent, sold, the proceeds paid into Court, and the question of the claims upon the fund referred to the registrar. He reported that the yacht had been bought for 1050*l.*, of which sum 550*l.* had been provided by the claimant, but that he was not satisfied that this sum had been advanced on the terms of the claimant becoming part owner. This report was confirmed by Bucknill J., and the whole of the proceeds ordered to be paid out to the administratrix:—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), that the order must be discharged, for, on proof by the claimant of the advance of a portion of the purchase-money wherewith another person had purchased the property, a presumption, which had not been displaced by any counter-evidence, had arisen in favour of the claimant, in accordance with the ordinary rule as to resulting trusts stated by Eyre C.B. in *Dyer* v. *Dyer*, (1788) 2 Cox, 92, and, therefore, the claimant was entitled to $\frac{55}{105}$ths of the proceeds of the yacht.

APPEAL by defendant, claimant in an action of possession, against a decision of Bucknill J., confirming a report of the registrar finding the respondent (plaintiff) entitled to the whole proceeds in Court of the yacht *Venture*.

On June 5, 1907, the plaintiff, Margery Ida May Stone—widow and administratrix of the late Andrew Stone, who died intestate March 14, 1907—issued a writ addressed to the owners and parties interested in the yacht *Venture*, claiming possession of the yacht, with costs and damages against such persons as the (Admiralty) Court might find liable for the detention thereof. On June 10, by consent, an order was made giving the plaintiff possession, and providing for the sale of the yacht. On July 15 an application by the plaintiff for payment out of Court of the sum of 831*l.*, the proceeds of sale, was referred to the registrar to ascertain and report as to the claims against the fund. On July 23 the registrar reported that: "The only claimant was Mr. Percy Stone, brother of the late Andrew Stone, who gave evidence before me on July 22 on his own behalf, as did another witness, Mr. Sabistan. Each side was represented by counsel. The claim made by Mr. Percy Stone was that he was a partner in the yacht with his late brother, and was therefore entitled to the proportion of the fund in Court due in respect of his share.

"It appeared that for some years the late Andrew Stone—and it is admitted by Mr. Percy Stone—was sole owner of a small yacht, the *Arcadia*, in which he and his brother used to sail. As it was too small it was decided to purchase a larger yacht, and, after negotiations and inspection by both brothers, the *Venture* was bought in March, 1905, for 1050*l.* Of this sum 550*l.* was supplied by Mr. Percy Stone and 500*l.* was left on mortgage. As the vendor was anxious to have all the purchase-money, A. Stone on the sale of the *Arcadia* paid 300*l.* of the 500*l.*, and 200*l.* was found by Mr. Rubinstein, a solicitor, who took a mortgage on the *Venture* for this sum, which mortgage was duly registered. Subsequently the mortgage, in or about October, 1906, was paid off, A. Stone finding 75*l.* and P. Stone 175*l.*; the latter therefore claimed to be interested in the *Venture* to the extent of 675*l*.—the 50*l*. above the 500*l*. being commission payable to the agent of the owner of the *Venture*, which for some reason P. Stone did not regard as part of the purchase-money of the yacht.

"A. Stone was a medical electrician, and his brother was at first assistant to him with a salary, and then became a kind of partner who apparently received the fees from such patients as he attended. A. Stone appears to have been extravagant in his habits and did not have a banking account, but handed cheques received from patients—the practice producing more than 2000*l*. a year—to P. Stone, who supplied him with the cash and the cheques he required. It was argued on behalf of Mrs. Stone that the account was in reality that of the firm, and that cheques drawn by P. Stone were really on behalf of A. Stone; but it is unnecessary for me to decide this point. I have to report that after considering the evidence I find that Percy Stone has not made out his claim to be a partner in the yacht. The evidence leads me to the conclusion that A. Stone was the actual and ostensible owner. I think that, having regard to the curious financial arrangements between these two brothers, it was entirely consistent with their relation that P. Stone should find the money he did without becoming a partner. There is not a line of written evidence to support his contention as to a partnership, and it is clear that A. Stone acted as the owner of the yacht, inviting the guests, ordering the provisions, &c.

"I am further of opinion that as there was a kind of running account between these brothers, such as I have already described, cheques handed by A. Stone to P. Stone would liquidate any debt due to P. Stone, as the cheques were paid from time to time and to the extent of such cheques, and that A. Stone may have rightly considered that he had paid off these advances for the purchase of the yacht, even though he might, on balancing the account at any particular and subsequent date, have been indebted to his brother for a considerable sum. For these reasons, there being no valid claim against the fund in Court, Mrs. Stone, as administratrix of her husband, is entitled to payment out of the whole sum. As it is usual for the registrar to state his opinion as to the costs of references, I have to say that, in my opinion, P. Stone, having failed in his contention before me, should pay the costs of the reference."

On July 25 the appellant (claimant) gave notice of objection to the report, and on July 29, upon the plaintiff herein undertaking to deliver her defence in an action, *Stone* v. *Stone* (1907 S. No. 1999), pending in the Chancery Division, the plaintiff in that action consented to stay further proceedings until after the hearing of the objection to the report, and the judge (Bargrave Deane J.) gave leave to the appellant (claimant) to produce further evidence on the hearing of such objection. On September 24 it was agreed between the solicitors for the respective parties that pleadings in respect of the objection by the appellant (claimant) to the report should be dispensed with and the objection heard by way of motion. On October 21 and 28 the appellant (claimant) moved the Court that the report of the registrar should be set aside on the ground that his findings were wrong in law and fact, and were unsupported by, or against, the weight of the evidence. On November 1 the following judgment was delivered by—

BUCKNILL J. The yacht which was the subject of the action of possession brought by Mrs. Stone was by consent sold, and the net proceeds amount to 831*l.* That amount has been brought into Court to abide the event of this decision. Other proceedings have been commenced—lamentably, I think, and, as far as I can see, somewhat unnecessarily, in Chancery by Percy Stone—an indication of family feeling in this matter which is in my opinion lamentable—for the parties are fighting over this 831*l.*, and I am asked to say, on the evidence, that this widow is only entitled to half the proceeds of the yacht.

But I have to decide the case, and I have to ask myself two questions—first, was the registrar right, was he justified, that is to say, on the evidence before him, in making the report which he has made? The only witnesses whom he heard, though I think some letters were put in, were Percy Stone and another person who was his assistant. The registrar had an opportunity of observing Percy Stone, and he probably asked himself the question, amongst others, whether his statements, made on oath, that he was a partner in the yacht with Andrew Stone, were to be accepted. He also heard the other witness, who gave evidence on a not very important point, because it only comes to this, that Percy Stone said that he and his brother were buying the yacht between them. If that witness had said that Andrew had told him that, it would have been important, but the evidence of that witness did not have much effect upon the registrar's mind ; and upon the story told by Percy Stone he found, and I think justifiably, in terms, that Percy Stone had not made out his claim to be a partner in this boat. Amongst other things the registrar said : [The learned judge read the last paragraph of the report set out above, and continued :—]

Now I have said that I think the registrar was right in his finding of fact. He saw the witnesses and I did not, but I think that I should have come to the same conclusion myself. The evidence before him was shortly this. Percy Stone was called, and he proved that there were two boats which Andrew Stone had owned prior to the purchase of the *Venture*—the *Arcadia* and the *Cymbeline*. Percy Stone said the *Arcadia* was Andrew's own property. "We agreed," he said, to buy the *Venture* together. Then he said what the price was ; he said, "I found 550*l*., the *Arcadia* was sold for 300*l*."—and here is a funny bit of evidence which shews what the financial arrangements were. He said "this was paid to me, and I paid it to Rubinstein to pay off Baird, and Rubinstein paid off Baird 200*l*. borrowed from Rubinstein." Mr. Rubinstein took a mortgage, we know, of this yacht to secure that advance, and the witness proceeded : "200*l*. was paid off on October 30 ; my brother paid 75*l*., and that left 125*l*. ; I paid this off by cheque." Then he was cross-examined by Mr. Nelson. He said : "I am an electrician ; I was a servant of my brother ; we were not really partners at Cleveland Row. The practice belonged to my mother. My brother owed money privately. The banking account was not kept at the Birkbeck Bank. No account was kept. It was a good business—over 2000*l*. a year. My brother's account was not kept in my name."

Now that is the statement which justified that particular part of the report. He also said : "I have given cheques for my brother ;

my brother gave me the patients' cheques, and I would give him cash. I cannot say why he did not have a banking account. It may have been his debts." Here, again, I make the observation by way of parenthesis—there is no doubt about it—that Andrew was an extravagant man, and that his domestic arrangements were extremely unfortunate. I need not say more than that. Percy said: "I may have given a cheque for 150*l.* last year. Every one acted for him as banker. Andrew Stone spent his money as he got it. My brother was in this business from my father's death. I joined him seven or eight years ago. My mother was paid an allowance. I received the money patients paid me. First I received a salary. I paid my mother entirely. Introduced as a partner on condition that I paid my mother. Rubinstein's never acted for my brother in the purchase. I bought the boat." I stop there for a moment, and I now turn to the correspondence. The letter to which I refer was not absolutely put in—that is, I have no note of it—but it was in the correspondence handed up by Mr. Langdon. I refer to a letter of Mr. Rubinstein's of April 11, 1907, and I find this expression: "When she was purchased by Mr. J. F. Stone, our Mr. Rubinstein advanced 200*l.* therein." That is Mr. Andrew Stone; so it is manifest that that must have been a mistake, because Mr. Rubinstein's own statement in his own letter is that the boat was purchased by Andrew; and here let me say once and for all that she was registered in the name of Andrew as sole registered owner at the Custom House.

Now I proceed with the evidence of Percy Stone: "I allowed it be registered solely in his name, though I paid for boat. Sole reason so as to be able to fly the blue ensign." I do not know what the registrar thought about that. Percy continued: "Only my money was banked. My brother had no money. Supplied my brother with money frequently, and sometimes he deferred payment. My wife went several times out. My brother appointed captain. I used to lend my brother cash. After purchase of vessel agreed I was to pay 2*l.* a week towards expenses, and 1*l.* a week, oil, petrol, &c. Wages 3*l.* 15*s.* I have two engineering bills. All bills rendered in my brother's name. I never had any bills in my name rendered for anything supplied

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to this yacht, except oil. All catering bills paid by my brother. Wine and dock dues also paid by him. I gave him 2*l.* every week in cash towards men's wages. It was by agreement I should pay half. Bought in 1905. 500*l.* mortgage 550*l.* I found by cheque. Nothing in writing to shew I paid 550*l.* Never suggested a mortgage. 75*l.* paid off in instalments. Can't say when 125*l.* was paid off (by cheque—counsel says October 30, 1906), I think that is about the date. I went very often on the yacht. *Arcadia* was my brother's own yacht. I went often on it. July 27 yacht went. I went about the beginning of August. I did not pay any of the expenses of the yacht. He may have paid for petrol at Dover. I never asked a friend." Again there is another observation, and a very strong observation. Although no friend was called before the registrar to say that he had been asked to go on board this yacht by Percy, the evidence produced before me by permission of Bargrave Deane J. was to contradict and vary the statement of Percy himself. Witness after witness has said, " We have often been asked and asked by Percy." What value can I attach to such evidence as that, Percy saying before the registrar he never asked friends, and the friends coming to say before me "Percy often asked friends" ?

That is all his evidence. Then Mr. Sabistan is called, and he says : " Percy Stone said they were buying it between them and 2*l.* was all he would allow for expenses. Andrew Stone asked me to see about paying off the mortgage. Went to see about paying off mortgage. Andrew paid me my salary 250*l.* by weekly instalments. Knew of differences between Stones."

I say once more that on the evidence before the registrar he was justified in coming to the conclusion to which he came.

Now a word or two before I refer to the evidence given before me. The case of *The Sais* (1), heard by Bargrave Deane J. on March 5, 1907, was a decision of the learned judge who gave permission in this case with which we are now dealing to allow further evidence to be called before me on this objection to the report. That was a case not exactly similar to this, but an application was made to the learned judge on objection to the registrar's report to admit further evidence, and he refused to

(1) 1906 E. No. 52, *Ship. Gaz.*, March 7, 1907.

admit it. Of course it goes without saying that my learned brother was right in making the order which he did in this case. I do not know what counsel urged before him, but I want to refer to the judgment in *The Sais* (1), knowing what must have been passing through his mind, and that judgment is very strong. He said this: "I follow the reasons of Sir Robert Phillimore in *The Thuringia.*" (2) I do not know that I have got that case before me, but Sir Robert Phillimore in that case draws strong attention to this point, that unless the parties—who had the case fought out before the registrar, and came before the Court afterwards on making objection to the registrar's report, and asking that further evidence may be given—could shew that they had been taken by surprise, or that some evidence had turned up which they did not know of before, the judge would necessarily look with great minuteness, and perhaps, although he did not use the words, with some suspicion, upon evidence which might have been called before the registrar and which was not.

Therefore I find it my duty—I may say I should certainly do so without that authority—to look most carefully and most minutely at the evidence of witnesses called before me who were not called before the registrar.

Now what was the evidence? First of all there were some letters; there was a letter written to a lady in which there is a statement that "The things off the yacht will be sent you. She belongs to Ike now." Ike is the claimant. It is untrue that she did belong to Ike. She is not suggested to have belonged to Ike. The highest which was ever stated was that he was a partner in it.

The next letter before me, which was not produced before the registrar, is a letter which does not affect my mind at all; it is a letter from Percy, the claimant, to a man called Bow. "My dear Bow,—You will I think be surprised to hear that we have purchased a forty-two ton auxiliary yawl, the *Venture*"; and he asked him to come down and lend him a hand on board, paying him the compliment of saying, "And who better than you?" That does not carry it any further. That was Percy's statement

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(1) 1906 E. No. 52, *Ship. Gaz.*, March 7, 1907.

(2) (1871) 1 Asp. M. L. C. 166.

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written to a friend. That letter made no impression on my mind.

Now I will just refer to the witnesses called before me. The first one called was Mr. Dixon; he was spoken to a month ago only before he came here, and therefore long after Bargrave Deane J. had given permission for further witnesses to be called; so he had not been thought of apparently by Percy when leave was given to adduce further evidence, and this boat was bought in 1905. What he said was this, "I was very little on the *Venture;* Percy often asked me to sail on the *Venture* as his guest." Again Percy says he did not ever ask him. "The deceased man said Percy and I are sharing the expenses and running the boat." I should think it is quite likely they were. That is not at all inconsistent with Andrew's owning the boat and that Percy was paying half the expenses, as otherwise the boat would be laid up because the extravagant Andrew would probably not have been able to pay the expenses himself. He was cross-examined by counsel for the plaintiff, and he then said that they shared the *Arcadia* expenses, but that she belonged to Andrew, and he said the expenses were shared between the two brothers. Then the letter was read of March 15, to which I have just referred, and I do not think there is anything more in his evidence to which I need refer, except that in re-examination he said that Andrew owned the *Arcadia* and the *Cymbeline.* Mr. Ewer was the next witness called. He said Andrew asked him to stay with him last summer, and he joined him as sailing friends, taking a share of the expenses; he said Percy and Andrew owned the boat and shared the expenses. Without saying that that gentleman is a dishonest witness, it is very likely and extremely probable that, instead of saying "Percy and I own the boat and share the expenses," he said exactly the same thing as to the other witness—"The boat belongs to me, but we share the expenses." Then he is cross-examined, and he says, "Andrew wrote to me last winter, and he said Percy and I own the boat."

Then the skipper was called, but I do not think he was a satisfactory witness; he had himself to look after. He might very well have thought that the boat belonged to the two; he did not trouble much about it. When Andrew died he naturally looked to the first man he could think of, and that was Percy. I was not altogether pleased with the demeanour of that witness in the box. I do not say he was saying that which was wilfully untrue, but I put him on one side, because he made no impression upon me in favour of the side he was called for. Then I come to the evidence of Mr. Roe, who says, "I knew Andrew and Percy; Ewer and I shared a boat." He gave the same sort of evidence that Mr. Ewer did: "Andrew said lay your boat up and come and sail with us." These men were independent, they preferred to have their own little boat in their own way, and they declined the invitation; but he went on to say, "Andrew said Percy and he owned the yacht and shared the expenses." When he was cross-examined he said, "Andrew told me Percy and he shared the expenses and owned the yacht."

I make the same observation about him as about the other witness: they may have been perfectly honest, but they were not called before the registrar, and one would have thought that they would have been called when the claim was made, but they were called after the registrar had reported against the claim; and it is quite easy to understand that these men would be thinking Andrew said, "We own the boat together and pay the expenses," when all that he said was what he said to another witness, "We share the expenses," without saying anything about the ownership.

Then Mr. Hickman is called. He apparently is a very fair witness, and he says, "Andrew told me the yacht was the joint property of Percy and himself"; and in cross-examination he said, "I was very friendly with Percy; I was asked about three weeks ago to give evidence." These persons had no reason whatever to think about this case from 1905 to 1907, and yet they were called to say exactly what passed in terms, even the very words. They might have been mistaken in their evidence, but I do not think it was dishonestly presented to the Court.

Then a lady was called to whom the letter was written. I do not wish to say more about that than it seemed to me to be quite unnecessary to have called her.

That is the evidence. The conclusion to which I have come is this, that the registrar's report was justified by the finding which he arrived at, and that the evidence called before me and which might have been called before the registrar, and which one would have thought would have been called before the registrar, if it had been thought at the time that it was valuable, is, although I do not go so far as to say that the witnesses were all trying to deceive me, not such evidence as enables me to get over the great obstacle which presents itself to the claimant—namely, the fact that the boat was registered in the name of Andrew alone, the fact that Andrew owned the two previous boats, the *Cymbeline* and the *Arcadia*, the fact that the expenses were jointly incurred between Percy and himself, the fact that Andrew was an extravagant man having no banking account, paying his way, making 2000*l.* a year, or perhaps less—there was a quibble whether it was 2000*l.* or not—spending the money as it came in, and no banking account, and getting his brother to cash his cheques when he wanted them. These two brothers were on very affectionate terms with each other, enjoying their holidays together on board this yacht; and it seems to me to be a most lamentable affair that this litigation should have been started. The claim has not been proved to my satisfaction. If it had come before me on the evidence which I have heard only I should certainly have rejected the claim. I find the registrar was justified in the conclusion at which he came on the evidence before him, and the whole result is that I confirm the registrar's report, the plaintiff to have the costs which have been properly incurred before the registrar, the costs of this objection to the report, and the costs of the action. Liberty to apply.

On appeal:—

1908. March 5. *J. A. Hamilton, K.C.*, *Langdon, K.C.*, and *A. D. Bateson*, on behalf of the appellant (claimant), submitted that, as the uncontradicted evidence produced before the registrar and Bucknill J. established that Percy Stone had advanced half the purchase-money for the yacht, his claim to share the proceeds in Court should have been pronounced for, and that the absence of writing, upon which the registrar relied, was immaterial, as it was due to the relationship of the parties, the two brothers, Andrew and Percy Stone, having been always together.

Laing, K. C., and *A. E. Nelson*, for the respondent (plaintiff). The question before the registrar was, Could the claimant, Percy Stone, make out his case?

[LORD ALVERSTONE C.J. How came the question whether Percy Stone was or was not part owner of the yacht to be left to the registrar?]

It has been done in Admiralty cases of this class, and there is no appeal on that point.

The registrar found that as there was no valid claim against the proceeds in Court, Mrs. Stone, as administratrix of her husband, the sole owner, was entitled to payment out of the whole fund. The evidence upon which that finding rested was reviewed by Bucknill J., and that learned judge came to the conclusion that the report was fully justified. He further held that the additional evidence heard by him, and which might have been called before the registrar, had failed to establish the claim of Percy Stone to any share in the proceeds of the yacht.

The judgment of the COURT (Lord Alverstone C.J., Farwell and Kennedy L.JJ.) was delivered by—

FARWELL L.J. In my opinion a great deal of time and money has been wasted in discussing a point which really does not arise, or which need not have arisen. It would have been amply sufficient to call Mr. Percy Stone, and when he had once proved—as in my judgment the report of the registrar shews that he did—that he found 550*l.*, part of the purchase-money, the ordinary rule applies.

That rule is stated by Eyre C.B. in *Dyer* v. *Dyer* (1) as follows: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successivè, results to the man who advances the purchase-money; and it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use

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(1) 2 Cox, 92.

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results to the feoffor." Since trusts and equities are now recognized, and may be enforced under the Merchant Shipping Acts, this principle extends to ships, although under the old Registry Acts it did not.

It follows that when it is once proved that Percy Stone advanced 550*l.* of the 1050*l.* purchase-money for this yacht he thereupon became entitled to fifty-five 105ths. That being the presumption, it was, of course, open to the other side to displace that presumption, but it was not incumbent upon Percy Stone to prove more than that. It was for the other side to displace that presumption if they could, but they offered no evidence at all. I regret that there should have been this reference. It seems to have done no good.

The result is that, in our opinion, the order ought to be discharged, and there ought to be an order for the payment of fifty-five 105ths of the proceeds to the appellant. The appeal will be allowed, without costs. The appellant will have the costs of the reference, but not of the hearing before Bucknill J. (1)

Solicitors for appellant: *Rubinstein, Myers & Co.*
Solicitors for respondent: *Lowless & Co.*

(1) On March 17, the Court of Appeal, having heard counsel for respondent and appellant on an application on behalf of the respondent that the decree of the Court of Appeal of March 5 be varied, ordered that such decree be varied by directing that the respondent (plaintiff) do pay the appellant's costs of action, in addition to those already provided for by the said decree, and, further, that the order of the Court of Appeal of November 12 last (in respect of the refusal of an application by the appellant for a stay) do stand, so far as the costs allowed thereby to the respondent are concerned; but the Court of Appeal made no order as to the costs of the present application.

T. L. M.

Referred to. OIVIND LORENTZEN'S CASE. [1949] A. C. 236

[IN THE COURT OF APPEAL.]

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Admiralty—Collision—Picking up Pilot—"Keep her Course and Speed"—Regulations for Preventing Collisions at Sea, 1897, *art.* 21.

When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall, under art. 19 of the regulations for preventing collisions at sea, keep out of the way of the other, and, to enable her effectually to do so, it is provided by art. 21 that the other shall keep her course and speed; but the obligation, with reference to speed, incumbent upon the latter vessel, is subject to the qualification that if she is, at the material time, to the knowledge of the giving-way vessel, properly engaged in an ordinary nautical manœuvre, such as picking up a pilot, she will be entitled to carry it out, although the operation involves a reduction of speed.

APPEAL by defendants, the Chesapeake and Ohio Steamship Company, Limited, owners of the *Roanoke*, in an action of damage by collision, against a decision of Bucknill J., finding their vessel to blame as well as the *Windsor*, owned by the plaintiffs.

The case is reported on the meaning to be attached to the words "shall keep her . . . . speed" in art. 21 of the regulations for preventing collisions at sea, 1897. (1)

On October 3, 1907, about 9 P.M., the weather being fine and clear, the wind northerly light, and the tide flood of the force of about a knot, the steel screw steamship *Windsor*, of 4070 tons gross register, and twenty-seven hands, from Odessa to Rotterdam with grain, was off Dungeness in the English Channel, when, under the circumstances hereinafter detailed, she came into collision with the steel screw steamship *Roanoke*, of 3709 tons gross register, and thirty-one hands, from Baltimore to Rotterdam with general cargo.

Both vessels were looking for a Dutch pilot, and having sighted the same pilot schooner, they were making for it in such a way that, at the material time, they were "crossing so as to involve risk of collision" within the meaning of art. 19 of the regulations for preventing collisions at sea. The *Windsor*, which had the *Roanoke* on her own starboard side, should, therefore, under this article, have kept out of the way of that vessel. For failing to do so she was, in the Court below, found to blame, and her owners did not appeal. On the other hand, the *Roanoke*, which had admittedly reduced her speed to pick up the pilot, was held, in the Court below, also to blame for disobeying the correlative article (21) by not keeping her speed, as appears from the following extracts from the judgment, delivered December 2, 1907, by—

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(1) Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. . . . . . ."

Bucknill J. Dungeness is the important place for consideration in arriving at a conclusion as to the position of these ships at the moment of collision, because the first point is to find where it was the collision happened. If the courses given by the witnesses from the *Windsor*, from the *Royal Sovereign*, and from Dungeness are correct, the collision could not have taken place anywhere near where I find, as a fact, it did take place, but it must have taken place very much more out in the channel. I have had an opportunity of observing the witnesses, and I say, without hesitation, that, on this part of the case, I accept the story of the *Roanoke*. I find as a fact that the *Roanoke* did pass Dungeness when it was about a mile distant and abeam, and I accept the course given by the master of the *Roanoke* as steered after Dungeness was abeam, and I find from that—the Elder Brethren and I have very carefully worked it out on the chart this morning—that the place of collision would be about E. by N. of Dungeness three and a half miles, taking as a starting point that which is described by the *Roanoke*, that is to say, a mile distant from Dungeness, bearing about E. and by N., and then steering N.E. by E. ½ E. up to the point of collision.

Now that is the place of collision. Having fixed that, I am enabled to say that the story told by the *Windsor* as to the place of collision, and as to the distance at which she passed from Dungeness, cannot be true, unless she had very much starboarded her helm and gone into the bay, and if you mark off the course given by those on board the *Windsor* from the *Royal Sovereign* abeam and from Dungeness two and a half to three miles distant, and prolong that course, on which the witnesses from the *Windsor* say she was going, you cannot get the place of collision anywhere near where I find as a fact it did happen, unless, after passing Dungeness, the *Windsor* went into the bay to look for that which she desired, namely, a Rotterdam pilot.

Now, whether she did that or not, she admits that she was looking for a pilot, and that she had seen two pilot boats, but not the pilot boat she wanted. Then her story is that she ported her helm until she had come round about three points, when she was heading S.E. or E.S.E.—it does not matter which for the purposes of this judgment—and that she was lying practically stopped, having discerned the Rotterdam pilot cutter, which was not in the bay where she might have expected to have found it, but somewhere outside the bay, where, in point of fact, it was.

As to the veracity and the truthfulness of the story of the *Windsor*, I have had considerable difficulty, and if one can find an independent witness who will give you assistance, it affords a very strong help to the Court in coming to a conclusion. Unfortunately the witness about whom I am going to speak was examined and cross-examined at Rotterdam. He was the pilot who was subsequently engaged by the *Roanoke*. He had turned in, and one must take his evidence as one reads it, and he was told that he was wanted, and he got up and got into his boat, and was in his boat something like ten minutes—that is to say, a few minutes, as it would be very unjust to bind a man down to the exact time. Then he is asked these questions in chief: "Which vessel did you tell your men to pull towards, the one with the signal light or the other one?—A. The one with the signal lights. Q. When you got into your boat, did you see two steamers?—A. Yes. Q. Had both of these steamers got signals for a Rotterdam pilot?—A. One of them had. Q. What was that signal?—A. Two bright lamps on the mizzen mast. Q. How was the steamer shewing the two bright lamps heading when you first saw her?—A. About E.N.E. Q. Did you see how the other steamer was heading?—A. The other steamer was coming from the East Bay." That is the first time in his examination that the words "East Bay" had been used. "Q. How do you think that steamer was heading?—A. I think S.E. by E." He was not very far wrong there, because that is the pleaded heading, or thereabouts. "Q. Are you quite sure that only one of these two vessels had two white lamps?—A. Yes, it was the *Roanoke* which had the two white lamps up." Then he speaks about the lights he saw, and thinks they were about three-quarters of a mile off him and both converging towards him. The truth is that they were both going towards him in his boat, and I strongly suspect that, regardless of all rules of navigation, they wanted to get the pilot; and that is about the plain common-sense view of the matter, because it is admitted that the *Roanoke* acted for the pilot cutter, which had been seen by the master for some time, and it is also admitted that those on board the *Windsor* had practically taken off all their way in order that the pilot boat might row to them.

I accept the statement of the pilot in the boat, who said that he rowed out to them. He was in his boat for about ten minutes. They were both coming towards him, of course at different angles, shewing different lights, one shewing also the proper two vertical lights, and I find that at that time the *Windsor* was coming out of the East Bay.

Now, that being so, what was the course of the other ship? I have said what it was, and I have found where the collision took place, and, that being so, I find as a fact that the *Roanoke* and the *Windsor* were so proceeding that the *Windsor* had the *Roanoke* on her starboard bow or side, and that they were proceeding so as to involve risk of collision at the material time before the collision happened. It follows, therefore, that I find that they were not overtaken and overtaking ships. At one moment in a sense they were. When they passed Dungeness the *Windsor* had passed at 8.15 and the *Roanoke* had passed at 8.35, and if, as I suspect, what was nearer the truth than as stated by the witnesses from the *Windsor*, the *Windsor* was very much nearer in than she says she was to Dungeness at that moment, it may be then that they were overtaken and overtaking ships; but that position was discontinued by those on board the

Windsor, who deviated from their course and took their ship into the East bay and came out again, porting a sufficient number of points—four, I should think, at least—to bring her out from the bay until she was heading E.S.E. or S.E.

I find as a fact that when these two vessels were approaching the pilot boat, and when they were about three-quarters of a mile off it, each trying to get to it first probably, and each converging towards it, those on board the *Windsor* had the *Roanoke* on their starboard bow, or side, and the ships were then so proceeding as to involve risk of collision.

That being so, the matter becomes comparatively easy. The *Windsor* must be assuredly found to blame. She did not take the proper steps, or any steps, to avoid the *Roanoke*. I think the learned counsel on behalf of the *Windsor* must have seen the difficulty his ship was put in as soon as the Court found that they were crossing ships. Therefore the *Windsor* is to blame.

Now, how about the *Roanoke?* What does the *Roanoke* say? Those on board the *Roanoke* admittedly eased, put their engines at half-speed, stopped, and acted, not for the purpose of, or in connection with, the other ship at all, which they must have seen, and, as I find, did see, at a material time before the collision, but for the purpose of getting to the pilot boat, and the master admitted it. I was struck with the manly sort of way in which the master gave his evidence. He did not fence with the question. He was not going to tell a falsehood about having acted for the pilot boat. He said, "I did," and it was difficult to make him understand in the box that he was not right in doing so.

Each case must be determined upon its own peculiar facts and circumstances. The master has said in this place, in a straightforward way, that his speed was altered and decreased for the purpose of picking up the pilot out of the boat. But that will not avail him, in my opinion, as a matter of law. He had the other ship in his eye. He saw her. He knew where she was. He had probably a keen suspicion what she was doing —I think we have not heard the whole truth in this case—and they both saw each other, and both saw the small pilot boat, and they acted, but not for each other—they probably did not think

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much about each other. According to the mate of the *Roanoke*, and according to the master, the *Roanoke* could have crossed the bows of the *Windsor* if her speed had been maintained. I find that as a fact.

I find, therefore, that both ships must be held to blame—the *Windsor* for not taking steps to keep out of the way of the *Roanoke*, which she had on her starboard bow, and the *Roanoke* for not taking proper steps to keep her course and speed when she was bound to keep them.

The note to this particular rule (art. 21) does not apply in this case, because, regardless of all rules, the master of the *Roanoke* chose to reduce his speed to get to the pilot boat. His excuse was that he might otherwise have run over the pilot boat. I have nothing to do with that. The pilot boat could take care of itself. There was no danger to the pilot boat; the danger was that both the vessels should come into collision in trying to get at the pilot boat in an improper and negligent manner, and therefore they are both to blame.

1908. March 4. *Aspinall, K.C.*, and *Lewis Noad*, for appellants (defendants), owners of the *Roanoke.*

Laing, K.C., and *Adair Roche*, for respondents (plaintiffs), owners of the *Windsor.*

The arguments of counsel sufficiently appear from the judgments, and all the cases cited by them are mentioned therein.

Cur. adv. vult.

April 6. LORD ALVERSTONE C.J. This is an appeal in a collision case tried before Bucknill J. The collision occurred between the steamship *Windsor* and the steamship *Roanoke*, a few miles to the eastward of Dungeness, on the evening of October 3. Bucknill J. found both vessels to blame. The only point argued before us was whether that judgment should be reversed in so far as it found the *Roanoke* to blame.

The material facts may be briefly stated. The two vessels being bound up channel, the *Windsor* had, at some short time before the collision, altered her course to the northward so as to go into Dungeness Bay in search of a pilot boat. Shortly before the collision the *Windsor* was coming out of the bay, on a course E.S.E. or S.E., heading towards a Rotterdam pilot schooner. At this time the *Roanoke*, bound up channel, was steering N.E. by E. ½ E., and heading towards the same pilot boat. The *Windsor* was inside, that is, to the northward, of the *Roanoke*, and it is needless to say that upon these courses the *Windsor* had the *Roanoke* on her starboard side, and it was the duty of the *Windsor* to keep out of the way of the *Roanoke*, and, if the circumstances of the case permitted, to avoid crossing ahead of her (arts. 19 and 22).

Under these circumstances it was the duty of the *Roanoke* to keep her course and speed (art. 21). As I have already said, it was not contended that the *Windsor* was not to blame. The learned judge has found that she took no proper steps, or any steps, to avoid the *Roanoke*. He also found the *Roanoke* to blame on the ground that she did not keep her speed as provided by art. 21; and the question we have to decide is whether or not that judgment is correct.

The case for the *Roanoke* was that, having two vertical bright white lights exhibited as a signal for a pilot boat, a pilot boat was sighted ahead of her, and a small boat was seen to be put out of the pilot schooner into the water and row towards the *Roanoke*. Thereupon, at a distance of three-quarters of a mile, the engines of the *Roanoke* were put to half speed, and three minutes later were stopped, until it was seen that the *Windsor* was endeavouring to pass ahead, whereupon the engines were put full speed astern and three short blasts blown. The reason given by the master of the *Roanoke* for his manœuvres was that he was about to take a pilot, and that he had diminished his speed for the purpose of picking up the pilot out of the boat. At the time of the collision the small boat, which was rowing towards the *Roanoke*, was at a distance of about 300 yards from the *Roanoke*, right ahead, and the pilot schooner, at a distance of 700 yards, also right ahead.

Bucknill J. has held that the fact that the *Roanoke* was about to take up a pilot, and slackened her speed for that purpose, affords no excuse, and that inasmuch as under art. 21 she was bound to keep her course and speed—and it was not disputed that if the *Roanoke's* engine speed had not been reduced she would have passed ahead of the *Windsor*—the *Roanoke* must be held also to blame.

The effect of this decision is of very great importance, because it amounts to a ruling that if two vessels are approaching so as to involve risk of collision, it being known to both of them that the one whose duty it is to keep her course and speed is about to pick up a pilot, and is manœuvring for that purpose, and although the vessel whose duty it is to keep out of the way ought to have seen exactly what was being done, the vessel which had reduced her speed in order to take the pilot on board must nevertheless be held to blame under art. 21. In other words, as Bucknill J. has put it, the defence that the speed was altered and decreased for the purpose of picking up a pilot will, as a matter of law, not avail her. With very great deference to the opinion of my brother Bucknill, I cannot think that this is the true view of the law, and it seems to me that such a construction would in many cases render nugatory the express provisions of arts. 27 and 29.

Dropping and picking up pilots are operations which regularly occur at known and recognized places, and these operations must be undertaken by vessels in the ordinary course of their navigation. The East Bay of Dungeness is such a place. It was in evidence in this case that it is a place where pilot boats lie in readiness to put pilots on board ships. The *Windsor* herself had gone to the northward and gone into the bay with the expectation of finding a pilot boat, and had, in fact, seen two, which turned out not to be Rotterdam pilot boats; and, as already stated, having ported her helm, she was coming out on a course stated by the learned judge to be from S.E. to E.S.E., heading towards the same pilot boat to which the *Roanoke* was also heading. Coming out on that course, she had in plain view on her starboard side a vessel shewing two white lights, and thereby indicating clearly that she was in search of a pilot.

I have already stated that, if the vessels continued to approach so as to involve risk of collision, it was the duty of the *Windsor* to go under the *Roanoke's* stern, and in my opinion she ought to have seen, and had she had a proper look-out would have seen, that this vessel shewing the two bright white lights was signalling for a pilot, was approaching a pilot schooner, that a small boat had been put off, and that in the ordinary course the *Roanoke* must reduce her speed in order to take the pilot on board.

The case of *The Ada; The Sappho* (1) and the case of *The Albano* (2) both decided, as Bucknill J. did in this case, that the crossing rules apply when two vessels are approaching a place where they propose to take up a pilot, and, in my judgment, to hold that a vessel was not entitled to reduce her speed in order to take a pilot on board, when that manœuvre was perfectly visible to the ship whose duty it was to keep out of the way, would impose a most dangerous and serious risk upon vessels navigating in the ordinary course. In my judgment, "course and speed" in art. 21 mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. It is not difficult to give many instances which support this view. The "course" certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted: see *The Velocity*. (3) A vessel bound to keep her course and speed may be obliged to reduce her speed to avoid some danger of navigation, and the question must be in each case, "Is the manœuvre in which the vessel is engaged an ordinary and proper manœuvre in the course of navigation which will require an alteration of course and speed; ought the other vessel to be aware of the manœuvre which is being attempted to be carried out?"

I am further of opinion that the conduct of the *Roanoke* might, if necessary, be justified under arts. 27 and 29. She had signalled the pilot schooner. The pilot schooner had put out a small boat for her and, in my judgment, she could not properly have continued her course at full speed without endangering those on board the small boat, if not the pilot schooner, and certainly could not have done so without abandoning her intention, which she had already indicated by signals, to take the pilot out of the small boat, then only 300 yards ahead of her.

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(1) (1873) 2 Asp. M. L. C. 4. (2) [1907] A. C. 193.

(3) (1869) L. R. 3 P. C. 44.

It must be observed that the case for the *Windsor* is that the *Roanoke* ought never to have reduced her speed at all, and she has not been found to blame for improperly manœuvring her engines upon the assumption that she was entitled to take on board the pilot. For these reasons, in my opinion, the judgment, in so far as the *Roanoke* was found to blame, is erroneous and must be reversed.

Farwell L.J. The question in this case depends, in my opinion, on the true construction of arts. 19 and 21. The facts to which those articles have to be applied in the present case are clear and simple. Both vessels were making for a pilot—the pilot schooner was hove to about 700 yards nearly dead ahead of the *Roanoke* at the time of the collision, and the pilot was in the schooner's dinghy rowing towards the *Roanoke*, and about 300 yards from her, dead ahead. The *Windsor* was the vessel to which art. 19 applied (I will refer to her as the giving-way vessel), and the *Roanoke* had had signals for the pilot shewing for at least half an hour before the collision, and the *Windsor* ought, and must at any rate be taken, to have seen such signals, and to have known that the *Roanoke* was making for the pilot, and must slacken speed and stop her engines to take up the pilot.

Under these circumstances the question comes to this, was the *Windsor* bound to keep out of the way of the *Roanoke*, although the latter was, as the *Windsor* knew, slackening speed to pick up the pilot, or was the *Roanoke* bound to continue at full speed in order to keep out of the way of the *Windsor*, or, as the learned judge has held, were both vessels to blame, the *Windsor* for not keeping out of the way, and the *Roanoke* for not continuing her speed?

In my opinion the *Windsor* was bound to keep out of the way of the *Roanoke*, and the *Roanoke* was in no way to blame. The two articles (19 and 21) are correlative; the duty of keeping out of the way is put upon the giving-way vessel, and, in order to enable her to perform this duty, the other vessel is bound to keep her course and speed. But this latter obligation is not absolute and binding in all cases and under all circumstances;

for instance, if the *Roanoke* were overtaking a third vessel at the time when, under art. 21, she is bound to keep her course and speed, it is obvious that she must comply with art. 24 and must alter her course, and if necessary her speed also, in order to keep out of the way of the overtaken ship; so, too, if the *Roanoke* were meeting a third ship end-on she must alter her course under art. 18 and blow the appropriate number of blasts. It is clear that in both those cases the obligation to keep out of the way remains on the giving-way ship, although the other slacken her speed and change her course. In truth, art. 21 is intended to be a guide to the giving-way ship in the due performance of her duty under art. 19—if there is nothing visible or audible to the giving-way ship, she is entitled to assume that there will be no alteration in the course or speed of the vessel that she is crossing from the time when her duty arises, namely, as soon as the two vessels are crossing so as to involve risk of collision. Prima facie the vessel bound to keep her course and speed must make no alteration in either after she has once got within the area of possibility of danger of collision—the area, that is, within which the duty of the giving-way ship commences. But it would be impossible to apply this as an inflexible rule in all cases and under all circumstances; it must at least be qualified by reading into it "so far as is consistent with compliance with the other articles and with the safety of other ships," and this is the effect of art. 27. It is, however, said that this may be so, and yet that the vessel bound by art. 21 cannot deviate from it, even to perform an ordinary nautical manœuvre, duly signalled, if it be merely for her own convenience; but this appears to me to transpose the duty of keeping out of the way from the giving-way vessel to the other vessel. To pick up a pilot is a legitimate and usual nautical manœuvre. The master of the giving-way ship is bound to keep a proper watch on the other vessel and her signals and surroundings, and to apply his seamanship and common sense to the whole circumstances of the case. He must assume that the master of the other vessel will keep his course and speed under art. 21 in such a manner as good seamanship and common sense dictate, under the surrounding circumstances. This is certainly so in the two

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cases that I have mentioned of overtaking, or meeting end-on, a third ship; and in the same way no seaman is justified in assuming that a vessel that has been, and still is, signalling for a pilot, and is bearing down on the pilot's dinghy, a short distance ahead of him, is going to run up to her at nine or ten knots, but ought to assume that she is going to slacken speed and stop her engines in the manner in which a good seaman would act for such a purpose. I cannot bring myself to doubt that the master of the *Windsor* would have taken this view if he had not himself been running for the pilot schooner, but this fact cannot affect his duty under art. 19, or enable him to call on the *Roanoke* to subordinate her wants to his. So to hold would be to shift the duty of keeping out of the way from the giving-way vessel to the other, and would make art. 21 read as if the latter vessel were bound to keep her course and speed " so as to keep out of the way of the giving-way vessel," instead of " so as to enable the giving-way vessel to keep out of her way," which is, in my opinion, the true construction.

It follows that, so far from being to blame for continuing her speed in such manner as was necessary to enable her to pick up the pilot, the *Roanoke* would have been to blame if she had continued at nine knots, and the *Windsor* would have been entitled to accuse her of misleading her by signalling for and bearing down on the pilot boat and not slackening speed so as to pick up the pilot.

I have so far dealt with the case without reference to authority, but in my opinion the case is covered by the reasoning of Sir Robert Phillimore, and the Privy Council, in *The Ada; The Sappho.*(1) It is said that the rule then required the vessel to keep her course only, and not her speed; but it was held that she was entitled to alter her course to pick up the pilot for which she and the giving-way vessel were racing, and I see no distinction in principle between course and speed in such a case. It is as unreasonable to forbid the vessel which is entitled to require the giving-way vessel to keep out of her way to slacken her speed in order to pick up a pilot as it would be to forbid her to alter her course for the same purpose. There is nothing in *The*

(1) (1872) 1 Asp. M. L. C. 475; 2 Asp. M. L. C. 4.

Albano (1) to militate against this view, as I read the judgment of the Privy Council. It was there held that the giving-way vessel was not entitled to rely on the contention that the other vessel was slackening to pick up a pilot, first because as a fact the former never observed the other vessel at all, and secondly because the place at which the slackening took place was not the appropriate place at which to pick up a pilot; but the judgment proceeds on the basis that she would have been right in assuming that the other vessel was slackening speed for a pilot if she had, in fact, been doing so at an appropriate place and had duly signalled.

I need hardly say that I differ from Bucknill J. with great diffidence; but he does not appear to have directed his attention to the points with which I have dealt so much as to the question of danger to the pilot schooner and dinghy. I do not rely on any question of danger either to the schooner or the dinghy, for, as our nautical assessors differ on that point, I am not satisfied that any such danger existed, but on the other grounds above stated I am of opinion that this appeal should be allowed.

KENNEDY L.J. It is not necessary for the purpose of my judgment in this important case to refer to the evidence in detail. The learned judge in the Court below has accepted the statement of the witnesses from the *Roanoke* in all material particulars as to the relative position of the vessels as they approached each other, and he has disbelieved the evidence of the *Windsor* setting up a very different story.

As Bucknill J. has found the facts, the *Windsor* and the *Roanoke* were crossing ships, and the *Windsor* had the *Roanoke* on her starboard side. It was, therefore, the duty of the *Windsor* to keep out of the way of the *Roanoke*, and, in doing so, to conform to art. 22 of the regulations in force for preventing collisions at sea by not attempting to cross the bows of the *Roanoke*.

Both steamships were seeking a Rotterdam pilot to the eastward of Dungeness, about nine o'clock on the evening of October 3, 1907; both had sighted a Rotterdam pilot schooner, and were making towards it on converging courses. The pilot

(1) [1907] A. C. 193.

schooner put out her little boat, with a pilot on board to go to the *Roanoke*, which those on board the pilot schooner had noticed exhibiting the customary pilot signal of two vertical lights on the mizzen mast, and then the pilot schooner herself lay to, whilst, for some ten minutes, her boat was rowed towards the *Roanoke*, and then stopped, waiting the approach of the *Roanoke*. In the meantime the master of the *Roanoke*, having observed the pilot-schooner's boat coming to meet him, eased his engines to half-speed, and, three minutes later, stopped them, in order to take on board the Rotterdam pilot from the boat, which appears, at the time of the collision which occurred shortly afterwards, to have been lying some 300 yards right ahead of the *Roanoke*.

The *Windsor*, at the time when the *Roanoke* began to reduce her speed for the pilot boat, was still some three-quarters of a mile away on the port side of the *Roanoke*. She failed, as the judge has expressly found, to take any proper, or indeed any, steps to avoid a collision, and steamed at full speed across the bows of the *Roanoke*, striking the port bow of the *Roanoke* with her starboard quarter. Just before the collision the *Windsor* put her helm hard-a-starboard, and the *Roanoke* put her engines full speed astern.

That the navigation of the *Windsor* was improper, both in point of seamanship and as a violation of art. 19 of the regulations for preventing collisions at sea, there can be no question, and the learned judge has so held. But it is not disputed that, if the speed of the *Roanoke* had never been reduced, the *Windsor* would, in fact, have passed astern of the *Roanoke;* and the owners of the *Windsor* succeeded at the trial in a contention that the reduction of speed on the part of the *Roanoke* ought to be held to constitute a violation of art. 21. Bucknill J. has held, in accordance with this contention, that the *Roanoke* was also to blame for the collision. The owners of the *Roanoke* have appealed to this Court against this latter part of the judgment. Undoubtedly the question is one of some nicety, but upon the whole I am of opinion that their appeal ought to be allowed.

Art. 19 prescribes that "when two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other," and art. 22 forbids her trying to do so by crossing the other's bows. Art. 21 prescribes that "where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." Now it is my view that it is our duty to decide this case as it has been presented to the Court below, and to us, by the arguments of the one side and of the other; but, in passing, I may say that I am by no means sure, having regard to the judgment of the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) in *The Banshee* (1), that at the important time, namely, at the time when the reduction of the speed of the *Roanoke* commenced by the alteration from full to half speed, the relation of the vessels to each other was such that these articles applied to their navigation. In the case of *The Banshee* (1) the *Banshee* was overtaking the steamship *Kildare*, and the *Kildare* ported her helm to avoid a sailing vessel ahead, at a time when there was a distance of 800 yards between the *Banshee* and the *Kildare*. A collision occurred, and Butt J. had held the *Kildare* to blame for porting when, under art. 20 of the regulations of 1884, she ought to have kept her course; but the Court of Appeal held that the article did not apply, because, at so great a distance as 800 yards, the *Banshee*, the overtaking ship, could by proper navigation have kept clear of the *Kildare*, and therefore at that time no risk of collision existed, and, until that point was reached, the *Kildare*, the ship which was being overtaken, might alter her course without violating the article in question.

In the present case, when the *Roanoke* put her engines to half speed, the *Windsor* was no less than three-quarters of a mile away on her port side, and those who were in charge of the *Windsor* could have found no real difficulty in avoiding the *Roanoke*. According, therefore, to the judgment of the Court of Appeal in *The Banshee* (1), the *Roanoke* did not violate art. 21 in slackening speed, because then no risk of collision between the crossing steamships was involved. The stopping of the engines three minutes later might reasonably be regarded only as a further step in the same gradual process of taking off the way of the *Roanoke* for the purpose of picking up the pilot.

(1) (1887) 6 Asp. M. L. C. 221.

Putting, however, this line of reasoning entirely aside, and treating the relative position of the *Windsor* and the *Roanoke* when the latter altered her speed, and the distance between them at that time, as bringing arts. 19, 21, and 22 into operation, I am of opinion that the *Roanoke* ought not to be held to blame on account of the alteration.

I will deal, in the first place, with the construction of art. 21 in its application to the circumstances of the present case. Prima facie the direction to keep course and speed appears rigidly to enjoin a maintenance of heading and speed, but it has been held in *The Velocity* (1) that this is not a correct view so far as regards course, and I think that a corresponding qualification ought for similar reasons of practical good sense to be admitted in regard to speed. "Keeping her speed" ought, I think, to admit the interpretation of keeping that speed which, according to the criterion of good seamanship, is the right speed to be kept in the performance of the nautical manœuvre in which the vessel is at the time engaged. It would be a strange thing if a vessel, in order successfully and in the ordinary and proper way to perform a proper nautical manœuvre, must alter her speed, but, nevertheless, must be held to infringe art. 21 by such alteration if it takes place at a time when she is being approached by another vessel, which is either overtaking her within art. 24, or is a crossing steamship which has her on the starboard side within art. 19, although the manœuvre in which she is engaged, and the necessity of altering speed which the manœuvre involves, are perfectly obvious to the overtaking or crossing vessel, and although the alteration of speed in no way prevents such overtaking or crossing vessel, if properly navigated, from keeping out of her way. It seems to me that this cannot be the right interpretation of the injunction to keep her speed. It would introduce into navigation not infrequently a probable source of danger. A steamer approaching her landing place for goods or passengers, or drawing up to an anchorage, must often either reduce her speed or abandon her object; and yet, if the interpretation of art. 21, for which the *Windsor's* counsel contend, is correct, she is bound, under pain of liability, should a collision occur, for a breach of art. 21, to adopt the latter alternative, if she has in view either a crossing steamer, which has to give way under art. 19, or an overtaking vessel under art. 24. But surely the officer who is navigating the crossing or the overtaking vessel will, in manœuvring his own ship, which has to keep out of the way, count, and ought to be able to count, upon the vessel which he has to avoid being so handled, in regard to speed as well as to course, as the proper execution of the nautical manœuvre in which she is obviously and visibly engaged may dictate; and indeed he may be dangerously misled if she acts differently.

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(1) L. R. 3 P. C. 44.

We have, I think, some judicial support for the view of the application of art. 21, which I am led to prefer, in the judgment of the Privy Council in the case of *The Velocity*. (1) That was a decision on the corresponding article (No. 18) of the regulations of 1862, which did not contain the words "and speed," but referred to "course" only. It was held by the Privy Council that the expression "keeping her course" did not mean following the direction in which the vessel's head happens to be turned at the time when she is seen and is acted for by the other vessel which has to keep out of her way, but meant keeping that course which she would take naturally and independently of the presence of the other vessel, as the proper method of her navigation at the particular place and time, as, e.g., in the manœuvre of rounding a point in a winding river by porting or starboarding her helm. It appears to me that the reasoning which led to the adoption of this view in regard to the meaning of the injunction as to course is justly applicable to the interpretation of the injunction added in the existing art. 21 in regard to speed, and that the speed that is to be kept by a vessel in accordance with this article, where the exigencies of the nautical manœuvre in which she is engaged are visible to the vessel which is bound under the regulations to keep out of her way, is that speed which a vessel engaged in such a manœuvre at that time and in that place would naturally keep, if navigated in a proper and seamanlike manner, in order successfully to perform the manœuvre. Of course the obligation of art. 29 must always be observed. If the pursuance of the

(1) L. R. 3 P. C. 44

manœuvre might otherwise, in the particular circumstances, embarrass the vessel whose duty it is to keep out of the way, or again, if it is reasonably possible that those in charge of that vessel may not appreciate the nature of the manœuvre, the manœuvring vessel is bound under art. 29 to take all steps that good seamanship and reasonable carefulness would dictate promptly to apprise the vessel which has to keep out of her way of what she is about, and, further, even to desist from the manœuvre if that is obviously necessary in order to avoid a collision. In the present case, however, there is no suggestion in the judgment of Bucknill J., or even in the evidence adduced on behalf of the *Windsor*, that those on board the *Windsor* did not perfectly appreciate, or at all events had ample opportunity to appreciate, the nautical manœuvre in which the *Roanoke* was engaged when the *Windsor* had to act as the crossing ship which had to keep out of the way of the other. The locality was one in which steamers bound for Rotterdam seek for Rotterdam pilots. The *Roanoke*, which those on board the *Windsor*, according to their pleadings, sighted when between one and two miles distant, was exhibiting on her mizzen mast the two vertical white lights which constitute the recognized signal for a Rotterdam pilot; the *Windsor*, at three-quarters of a mile distance from the *Roanoke*, had in view the Rotterdam pilot schooner and the dinghy, carrying a white light, and being rowed from the pilot schooner towards and right ahead of the *Roanoke*; and those on board the *Windsor*, in my judgment, had then alike the duty and the right to assume that the course and speed which the *Roanoke* would keep would be such as would enable her safely and in a seamanlike way to approach the little boat and pick up the pilot from her. There was ample time for the *Windsor* to keep out of the way of the *Roanoke*, if those on board of her had taken proper measures for the purpose.

Further, and quite independently of the correctness of this construction of art. 21, as applicable to the facts of the present case, I think that arts. 27 and 29 operate, in the circumstances of the case, to absolve the *Roanoke* from blame. Bucknill J., in the course of his judgment, after saying that the reduction of speed was not on account of or in connection with the *Windsor*, observes, "The master has said, in a straightforward way, that his speed was altered and decreased for the purpose of picking up the pilot out of the boat. But that will not avail him, in my opinion, as a matter of law." And again he says—referring to the *Roanoke's* reduction of speed to get to the pilot boat "regardless," in the learned judge's view, "of all rules"—"his (i.e., the master's) excuse was that he might otherwise have run over the pilot boat. I have nothing to do with that. The pilot boat could take care of itself."

It appears to me that it is not right, as a matter of law, to eliminate the position of the boat of the pilot schooner from the facts to be considered in judging of the propriety of the action of the *Roanoke* in reducing her speed as and when she did. It was, I conceive, the duty, alike from the lawyer's and the seaman's point of view, of those navigating the *Roanoke* to consider the safety of those on board that little boat, which quite legitimately was stopped right ahead of her, and was at the time of the collision only some 300 yards distant from her bows. It may be the fact, as my brother Bucknill states to be his opinion, that the boat could have taken care of itself, namely, it might possibly have escaped collision with the *Roanoke* even if she had continued her course without reduction of speed; and, as I understand their views, our assessors are divided in opinion upon this point, although they are agreed that there was nothing improper or unseamanlike in the navigation of the *Roanoke.* But it appears to me to be clear from the evidence that there was, if not a certainty, at least a real and substantial risk to the little boat, if the *Roanoke* held on at full speed. The chief officer of the *Roanoke* was asked by counsel for the defendants this question, "The pilot boat, as you told us, was practically ahead of you and the little boat; if you had kept your speed what would have happened to her, the little boat?" Answer: "We would have run them down." Even assuming that the little boat, if the *Roanoke* had not reduced her speed, might possibly have managed to get out of her way, I am still of opinion that there existed manifestly a real danger either of actual collision or of the boat being swamped, if a large steamer like the *Roanoke* came rushing past her at nine-and-a-half knots

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speed—a danger for the avoidance of which the *Roanoke* was bound by the dictates, alike of humanity and of seamanship, to provide, and in providing for which, as she did when she reduced her speed, she was protected from blame by arts. 27 and 29 of the regulations for preventing collisions at sea.

Appeal allowed.

Solicitors for appellants (defendants), owners of the *Roanoke: Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for respondents (plaintiffs), owners of the *Windsor: Thomas Cooper & Co.*

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WESTCOTT *v.* WESTCOTT (THE KING'S PROCTOR SHEWING CAUSE).

Divorce — Practice — Costs — King's Proctor — Unsuccessful Intervention — Matrimonial Causes Act, 1878 (41 *&* 42 *Vict.* c. 19), *s.* 2*—Petitioner's Costs to be paid by the King's Proctor.*

The Court possesses full power, in the exercise of its judicial discretion, to condemn the King's Proctor in the costs incurred by a petitioner in resisting an intervention by the King's Proctor.

The mere fact that an intervention by the King's Proctor is reasonable will not debar a successful petitioner from applying for costs.

Each application for costs is to be considered by the light of the particular case before the Court, but the general principle is that a successful petitioner, like any other litigant who succeeds, is entitled to costs unless his or her own conduct has really brought about the intervention.

THE petitioner (wife) obtained a decree nisi for the dissolution of her marriage, and the King's Proctor subsequently intervened, alleging adultery before the date of the decree.

The jury interposed after the close of the evidence, and on counsel for the petitioner rising to sum up her case,

Counsel for the King's Proctor insisted on his right to address the jury.

SIR GORELL BARNES, PRESIDENT, said that under the circumstances it was not necessary to sum up the case. He desired, however, to point out that the King's Proctor, acting in his official capacity on the fiat of the Attorney-General, was bound to lay all the facts, as he believed them to be, before the Court; and if, as might be assumed, that duty was performed with fairness, the King's Proctor was not to be blamed if witnesses called on his behalf failed, as in the present case, to convince the jury. The intervention in this case must be dismissed.

March 6. *Barnard, K.C.* (*Bayford* with him), for the petitioner, asked for costs.

Rawlinson, K.C. (*Victor Russell* with him), for the King's Proctor, opposed. Where a public officer proceeds in the exercise of his duty and does not act unreasonably he should not be condemned in costs. It is, moreover, for the Court to consider in these cases how far the petitioner has by his or her conduct in any way contributed to the intervention of the King's Proctor. It is submitted that the present petitioner has to some extent brought about the intervention.

[SIR GORELL BARNES, PRESIDENT. It may be said that the King's Proctor always acts reasonably, because he acts upon the fiat of the Attorney-General.]

Barnard, K.C., in reply. There is no reason why costs should not follow the event. Under the Matrimonial Causes Act, 1878, s. 2, the Court has absolute discretion over the costs in these interventions, and the Legislature has, moreover, indicated where the money is to come from, where the King's Proctor is condemned in costs. It may be said that the King's Proctor always acts reasonably, inasmuch as he only intervenes upon the fiat of the Attorney-General; but if it had been intended by Parliament that the King's Proctor was never to be condemned in costs, why was the provision of a fund, out of which costs were to come, mentioned in the Act? [*Crawford* v. *Crawford and Dilke* (the Queen's Proctor intervening) (1);

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(1) (1886) 11 P. D. 150; referred to, as to costs, in *Blackhall* v. *Blackhall and Clarke* (the Queen's Proctor intervening), (1888) 13 P. D. 94, at p. 95.

Rogers v. *Rogers* (the Queen's Proctor shewing cause) (1); *Hunter* v. *Hunter* (the King's Proctor shewing cause) (2); and several unreported cases were also referred to.]

SIR GORELL BARNES, PRESIDENT. I should like to have an opportunity of looking at the notes of the unreported cases which have been referred to, not because I feel any difficulty in this particular case, but because I do not want to say anything which might appear to conflict with anything I may have said in previous cases.

Cur. adv. vult.

March 9. SIR GORELL BARNES, PRESIDENT. The only question reserved for judgment in this case is the question of costs. The petitioner seeks to obtain her costs from the King's Proctor, and the King's Proctor, through his counsel, suggests that there should be no order as to the costs.

The question I have to decide turns on s. 2 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), which is as follows: "Where the Queen's Proctor or any other person shall intervene or shew cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or shew cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or shewing cause as aforesaid as may seem just"—those are the words that are important in the case, "as may seem just"—"and the Queen's Proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office."

Now I think the terms of that section leave the question of costs entirely to the discretion of the Court, and that that

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(1) [1894] P. 161.

(2) [1905] P. 217

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discretion must be exercised in accordance with those three or four words that I emphasized, namely, "as may seem just." Having now looked through the notes of the cases which were commented upon in the course of the arguments, I do not think that the cases really help one at all. The exercise of discretion in one case is very little guide to the exercise of discretion in another case. If these cases are looked through, I think we may generally discard from consideration one matter altogether—that is, any case of unreasonable action on the part of the King's Proctor. As I observed in the course of the arguments, the King's Proctor acts on the advice of the Attorney-General and looks up the case as well as he can, and a very difficult task he has, because he has to find out witnesses under very difficult circumstances, and it is not likely that cases will occur in which it can be shewn that the King's Proctor has acted unreasonably. But the argument on the part of the counsel for the King's Proctor amounts substantially to this—that, that being so, the King's Proctor, unless he acts unreasonably, cannot be, or at any rate ought not to be, condemned in the costs. I cannot agree with that view, because it would lead to the result that in no case practically (I do not say in no case at all) could the King's Proctor be condemned in costs, because it may generally be assumed that he is not likely to act unreasonably, so far as his own action is concerned, in getting up a case. But the difficulties the King's Proctor has in getting up such a case shew—and experience teaches one—how very often witnesses may very much mislead the King's Proctor and not come up to what is expected from them when their proofs are taken, and, if so, a case may completely fail against a petitioner notwithstanding the utmost exercise of care and reasonable diligence and proper action on the part of the King's Proctor, because he has to look into matters to which he was not an original party, and to get to know all these things, and he must take it from the information of somebody else. Now, if the view presented by the King's Proctor is correct, there would be practically no case in which an order could be made against the King's Proctor. But it is quite clear, from the terms of the Acts which govern these cases, that it is not intended to exclude from consideration of what is just, cases in which the King's Proctor, although acting reasonably, is in fact unsuccessful; and when the cases which have been cited to me are looked through, it will be found difficult from the reports to ascertain exactly all the details of the cases, and all that has weighed with the judges, so far as the conduct of the petitioner in each case is concerned. But, looked at roughly, I think the conclusion to be drawn from those cases in which no order has been made, and in which the party has been left to bear his own costs—I say looked at roughly, because one cannot follow all the details, especially when documents are referred to in the course of the reports, but are not set out—I think it will be found that there is something in the conduct of the petitioner, or something in the way in which the facts have been presented to the Court by the petitioner, in which there was, in effect, a reason for the intervention through something which the petitioner had done. I find in one case, *Hunter* v. *Hunter* (1), that the action on the part of the petitioner had been such that, although a decree was pronounced, when all the circumstances were in fact known, the petitioner was nevertheless condemned in the King's Proctor's costs, because, I take it, so much had been kept back that, on the materials before the King's Proctor, the case must have resulted in his favour unless the Court, under the power it possessed, had exercised its discretion in favour of the petitioner. That being so, the King's Proctor's intervention would be really, in form, successful, and it was only disposed of by the exercise of a discretion which let the petitioner still get a decree; but the petitioner, having kept a good many facts back, was condemned in the costs of the King's Proctor. The principle being, in my view, indicated distinctly by the words of the section already quoted, to the effect that the Court should act as it deems just, it seems to me that it is a discretion to be exercised in every case, and that the Court should be guided by the facts of the particular case before it. If the contention of Mr. Rawlinson were to prevail, then I should feel great difficulty in doing justice in a case (I am not speaking of this particular case for the moment,

(1) [1905] P. 217.

but any case) in which no possible blame of any sort or kind can be imputed to the petitioner, and in which somebody or other, or the witnesses, have given statements to the King's Proctor which have justified him reasonably in interfering, and therefore, of course, making it necessary for the petitioner to incur heavy costs; in that case one would be prevented from giving the petitioner costs which ought never to have been incurred. I do not think that would be just in such a case as I have indicated.

Bearing these observations in mind, as this case stands before me, the intervention, though quite reasonable and properly conducted upon the materials which were placed before the King's Proctor, was in actual circumstances, as ultimately proved, an unsuccessful intervention, for which it cannot be said, according to the view the jury took of this case, that the petitioner was in any way to blame.

It is, of course, to be noticed in this case that the jury stopped the case, and I think I may say, if I had the case myself to decide. I might have stopped it at a somewhat earlier period. They stopped it after the evidence was over and a few minutes after Mr. Barnard began his address to them; and I am afraid Mr. Rawlinson wasted about half an hour trying to convince them that they were wrong—a very hopeless task to undertake when they had once made up their minds.

That being so, I think I ought to exercise my discretion in favour of the petitioner and give her an order that her costs be paid by the King's Proctor. Therefore the intervention will be dismissed, and the costs will be paid by the King's Proctor. This is one of the cases in to-day's list in which the decree will now immediately be made absolute.

Solicitors: *The King's Proctor; Mann & Crimp.*

H. D. G.

1908
March 23.

LEVY *v.* LEVY AND DE ROMANCE.

Divorce—Practice — Adultery charged in England—Alleged Adulterer a Foreigner domiciled Abroad—Appearance—Dismissal from the Suit—Costs.

Upon a husband's petition for dissolution of marriage, the alleged adulterer, who was served abroad, entered an absolute appearance, filed an affidavit stating that he was a French subject domiciled in France, and moved the Court to dismiss him from the suit.

The Court *held* that it had no jurisdiction over the applicant and dismissed him from the suit, but refused to give him his costs, inasmuch as he had entered an absolute appearance to the citation.

René Théodore Ferdinand Levy filed his petition, giving an address in London, and alleging that he was domiciled in England, and praying for the dissolution of his marriage on the ground of his wife's alleged adultery in England with François de Romance, against whom he claimed damages.

The respondent appeared and filed an answer denying the adultery charged.

The alleged adulterer was served in Paris on November 19, 1907, and entered an absolute appearance to the citation.

He now applied, on motion, to be dismissed from the suit, and in his affidavit he stated that he was born in France of French parents, that he lived in France and had no intention of abandoning his French domicil, and that he had never been in England except on temporary visits of short duration.

Le Bas, in support of the motion. The Court has no jurisdiction over the co-respondent. The fact of his having entered an absolute appearance is not a ground for refusing the motion: *Grange* v. *Grange and Arendt.* (1) The only difference between that case and this is that the adultery in that case was alleged to have been committed abroad. The place is, it is submitted, immaterial. [He also referred to *Gaynor* v. *Gaynor* (2) ; *Machado* v. *Fontes* (3) ; *Phillips* v. *Eyre* (4) ; Piggott on Foreign Judgments, pp. 159, 160 ; the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 28, 33.]

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(1) [1892] P. 245.

(2) (1862) 31 L. J. (P. & M.) 116.

(3) [1897] 2 Q. B 231.

(4) (1870) L. R. 6 Q. B. 1.

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Wynn Werninck, for the petitioner. The affidavit of the co-respondent is not corroborated.

BUCKNILL J. I must accept the affidavit in this case. The question is whether this Court has jurisdiction over the co-respondent. Having regard to the authorities, I do not think that it has. I therefore dismiss the co-respondent from the suit, but without costs, as I think he should have objected at an earlier stage to the jurisdiction.

Solicitors for co-respondent: *Alfred Harris & Co.*
Solicitors for petitioner: *A. Abrahams & Co.*

H. D. G.

BAKER *v.* BAKER AND DWYER.

1908
March 30.

Divorce—Practice—Alleged Adulterer named in Petition a domiciled Irishman—Adultery in Ireland—Absolute Appearance—Subsequent Application to be dismissed from the Suit—Jurisdiction—Costs.

Where, upon a husband's petition for divorce, the alleged adulterer is domiciled abroad, and so is not subject to the jurisdiction of the Divorce Court here, the proper practice is for the petitioner to move for leave to proceed without citing him as a co-respondent.

ON November 5, 1907, the wife petitioned for restitution of conjugal rights, and the husband answered on January 28, 1908, stating that he and his wife had agreed to separate, and also alleging adultery and cruelty, all of which the wife in her reply, filed on February 11, 1908, denied.

On February 6, 1908, the husband presented a cross-petition, alleging his wife's adultery with Thomas Dwyer, and praying for a divorce and for further and other relief. The petition contained a charge in perfectly general terms, and also a specific charge of adultery in Ireland.

The wife filed an answer, denying the adultery.

The co-respondent was served in Ireland, and on February 20, 1908, he entered an appearance by his solicitor in England.

The suits were consolidated by order of the registrar, dated

March 12, the co-respondent being represented by his solicitor on that occasion.

Notice of motion was given on March 23, 1908, on behalf of the co-respondent, asking that he might be dismissed from the suit on the ground that his domicil was Irish; that the adultery charged, if committed at all, was committed in Ireland; and that the citation and petition were served on him in Ireland.

No damages were claimed.

The co-respondent, having been served in Ireland, entered an absolute appearance to the citation.

He now moved, upon an affidavit stating the facts, to be dismissed from the suit on the ground that this Court had no jurisdiction over him, he being an Irishman, domiciled and resident in Ireland.

Le Bas, in support of the motion, cited *Grange* v. *Grange and Arendt* (1), *Gaynor* v. *Gaynor* (2), and *Levy* v. *Levy and De Romance* (3); and he asked for costs against the petitioner.

Bayford, for the petitioner, opposed the application as to costs and asked that the co-respondent should pay the costs of the motion. The mere fact that a man was a foreigner would not, he submitted, be good ground for not mentioning him in the petition. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28, required that the alleged adulterer should be made a co-respondent. He referred to *Wray* v. *Wray and D'Almeida* (4) and *White* v. *White and Giovanni* (unreported).

G. P. Hastings, for the wife (respondent), who had been served with the notice of motion, asked for costs.

Le Bas, in reply. The proper course for the petitioner's advisers to have pursued would have been to move for leave to proceed without citing Dwyer as a co-respondent. In *Gaynor* v. *Gaynor* (2) the co-respondent obtained an order for costs. In the present instance the co-respondent does not ask for costs, but there is no jurisdiction to condemn him in costs.

BUCKNILL J. I think the proper order to make in this case is to dismiss the co-respondent from the suit on the ground

(1) [1892] P. 245.
(2) (1862) 31 L. J. (P. & M.) 116.
(3) Ante, p. 256.
(4) [1901] P. 132.

1908

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that he is a foreigner, and that this Court has, consequently, no jurisdiction over him.

If made a co-respondent in the petition—of the necessity for which I have some doubt—the next step should have been for the petitioner to move for leave to proceed without citing him. I shall make no order for costs as between the petitioner and co-respondent; but, if the wife was served with the notice of motion, she will have her costs of being represented here to-day as against the party who brought her here on notice, namely, the co-respondent.

Solicitor for co-respondent: *E. M. Lazarus.*
Solicitors for petitioner: *Robbins, Billing & Co.*
Solicitor for respondent: *W. H. Speed.*

H. D. G.

THE BLANCHE.

1908

March 30, 31; *April* 9.

Admiralty—Salvage—Practice—Payment into Court with Denial of Liability—Recovery of less than Amount paid in—Rules of the Supreme Court, Order XXII., *r.* 6 (*c*)—*Costs of Issues.*

A tug, under an engagement to tow the defendants' vessel, claimed salvage for services rendered whilst the towage contract was interrupted, and a second tug, which assisted the first, besides suing for salvage, claimed compensation for damage sustained in a collision with the defendants' vessel. By their defence, the defendants did not admit that either of the plaintiff tugs had rendered any salvage service. They also set up an agreement by the second tug for 20*l*., and alleged that any damage sustained by that tug was due to her own negligence. Finally they tendered as follows: "The defendants denying liability for more than 20*l*. part thereof for the (second tug) bring into court 100*l*. for the (second tug) and 50*l*. for the (first tug)." The Court found that both tugs had rendered salvage services; that there was no agreement with the second tug; that the damage that tug had sustained was due to her own negligence; and that each tug was entitled to an award of 50*l*. The Court, therefore, ordered the balance of 50*l*. out of the tender to the second tug to be repaid to the defendants under Order XXII., r. 6 (*c*), of the Rules of the Supreme Court, and, on the question of costs:—

Held, that the plaintiffs were entitled to their costs up to payment into court; that the defendants were entitled to those subsequent to that date, and, in accordance with *Fitzgerald* v. *Tilling*, (1907) 96 L. T. 718, the plaintiffs were entitled to any severable costs, subsequent to payment into court, in respect of the issues on which they had succeeded.

ACTION OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the tugs *Hercules* and *Islegarth.*

The defendants were the owners of the sailing ship *Blanche*, her cargo and freight.

The case is reported on the question of the effect of Order XXII. of the Rules of the Supreme Court, 1883 (1), on payment into court with a denial of liability in a salvage action where less is recovered than paid in, and also as to the costs of the issues raised.

The *Hercules* was a screw tug of 175 tons gross register, engines of 600 horse power, a crew of eight hands, and was of the value of 5000*l.* The *Islegarth* was a screw tug of 93 tons gross register, engines of 350 horse power effective, a crew of five hands, and was of the value of 4000*l.* The *Blanche* was a full-rigged iron sailing ship, belonging to Genoa, of 1526 tons gross register, and a crew of eighteen hands. She was on a voyage from San Francisco to Sharpness with a cargo of barley, and at the time was drawing 20 ft. 9 in. mean. Her value was: vessel, 4000*l.*; cargo, 15,143*l.*; freight, 1726*l.*—total, 20,869*l.*

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(1) Order XXII.

Rule 1: " . . . . in an Admiralty action, any defendant may . . . . with a defence denying liability, ... pay money into court which shall be subject to the provisions of rule 6. . . . ."

Rule 6: "When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:—

. . . .

"(*c*) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of a Court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him."

The action was tried, with the assistance of two of the Elder Brethren of the Trinity House, on March 30 and 31, 1908, and on April 1 the following judgment was delivered, in which the material facts relating to the salvage services are set out:—

Bargrave Deane J. The *Blanche* sailed from San Francisco towards the end of the year 1907, and duly arrived in the Bristol Channel. She there entered into a contract with the tug *Hercules* to tow her to Sharpness, and arrived in tow of that tug in King Road on February 28 of this year. The tide not serving to take her up to Sharpness, the *Hercúles* left for the time being, and the *Blanche* anchored there, with her starboard anchor and forty-five fathoms of chain. A pilot was on board, but he had finished his duties for the time being. She had an Italian crew on board, none of whom could speak English except one, who acted as interpreter and who was called as a witness. The pilot did not go ashore, but went to his cabin about half-past nine and retired to rest, leaving instructions that if the weather changed they were to pay out more chain, and, if necessary, let go the port anchor. There does not appear to have been any efficient anchor watch, and it is at least doubtful whether the pilot was called; at any rate, he did not come on deck until late in the morning, and when he did come on deck it was in consequence of the master of the tug *Islegarth* boarding the ship and calling him. In the course of that night it had blown heavily, with snow squalls, the result being that the anchor dragged and the vessel drifted until she got ashore on a muddy bank, about a mile to the north of Avonmouth. She lay there in the mud, with at least ten feet of mud up her side. It was a safe position, so far as being a place where she could lie, and admittedly she sustained no damage when lying there. The only difficulty was that if she lay there very long she might possibly have got so deep into the mud that it would have been a very serious and expensive matter to get her out, and therefore it was necessary she should be got out as soon as possible, and should employ tugs for the purpose. I do not propose to go into the question of the conduct of the crew of the Italian ship, because it is not material; but it is an odd story that the master came on deck in the course of the night, saw the ship was dragging, did nothing, but allowed his ship to drift, and went back to bed. However, in the result, the *Blanche* was towed back to about her former anchorage, and, subsequently, the *Hercules* resumed her original towage engagement, and towed the vessel safely to Sharpness.

The first question I have to decide is: Did the master of the *Islegarth* make a contract with the master or chief officer of the Italian ship that he would tow her off for 20*l.*? This is where the question of the interpreter comes in. I am not at all satisfied that that contract was made. That it was intended to be made may very likely be the case, but that it was brought home to the intelligence of the master of the *Islegarth* that he had made any such contract I do no think is established. Therefore we have a case in which there is no contract. Then there is no doubt that the *Islegarth* was engaged to tow the ship off, and therefore the *Islegarth* is clearly entitled to some salvage award for the services which were rendered. It is not suggested that the *Hercules*, which had returned, made any fresh contract beyond the original towage agreement. It is an undoubted fact that the *Hercules* helped to tow her off, and it is an undoubted fact that the crew of the Italian ship, in the presence of both the chief officer and master, made fast a rope from the *Hercules* to the bow of the Italian ship. It is an undoubted fact that the two tugs together did tow her off, and, so far as I can make out from the evidence, although there is some conflict about it, the towing off was not a matter of great difficulty. The weather had moderated very considerably. The weather report of Avonmouth shews that the wind had fallen from force 8 to force 4, and there was a good tide. Thirty-five minutes is the time which both tugs fix as the length of time they were towing to bring this vessel off.

Now I have to deal with the position of the ship, whether she was in any danger, the extent of the salvage services, and the further question whether the *Islegarth* is entitled to any compensation for damage or demurrage in addition to the salvage. I have considered this case carefully, and I notice that the pleadings of the defendants begin by denying liability. The defendants, while denying liability, pay into court 50*l.* for the *Hercules* and 100*l.* for the *Islegarth*, and the wording of the defence may be material when I come to consider the award. Paragraph 1 of the defence states that "The defendants do not admit that the plaintiffs or either of them rendered salvage services as alleged or at all." That is not an admission. Then in paragraph 7 I find this: "Save as aforesaid, none of the allegations of the statements of claim is admitted. The services were simply towage, entailed no risk, exposure or fatigue, and any damage, detention or liability incurred by the *Islegarth* were due to her own carelessness in not keeping herself clear of a ship stuck in the mud." Paragraph 8: "The *Blanche* was in no danger of any kind." Paragraph 9: "The defendants, denying liability for more than 20*l.*, part thereof for the *Islegarth*, bring into court 100*l.* for the *Islegarth* and 50*l.* for the *Hercules*." Now the difficulty which arises in these circumstances is this, that Order xxii., r. 6, states that: [The learned judge read Order xxii., r. 6, already set out, and continued:—] Now here I have to consider not only the payment into court in respect of the alleged salvage, but also payment into court in respect of the damage incurred by one of the salvors and further expenses consequent upon that damage. Let me deal with the case first as to salvage. In my opinion this is undoubtedly a case in which salvage services were rendered, but it is a case of towage salvage, and very little more. In my opinion the amount paid into court for the *Hercules* is sufficient. In my opinion the same amount is due to the *Islegarth* for salvage—that is to say, both vessels are entitled to the same amount for salvage. There is, however, the further question whether anything should be paid to the *Islegarth* in respect of the accident which happened to her. With respect to that I am a little hampered by this, that the defendant pays into court 20*l.* under the contract, and, assuming that there was a contract for 20*l.*, then the defendant has paid into court 80*l.* more. That is a difficulty, because it is a sort of confession and avoidance. It is a sort of confession that this tug suffered damage during the services, and I have had considerable difficulty in coming to a conclusion about it. I have spoken to the learned President about it, and taken his advice on this somewhat difficult question, and the result I have arrived at is this, that where there is, as here, an absolute denial of liability, and where there is, as here, an admission, a payment into court, a statement that the damages incurred by the *Islegarth* were due to her own carelessness, that is an issue for the Court, and must not be taken in any sense as an admission that there is anything due to this vessel for her injuries.

I had a case not very long ago, *The Reading* (1), in which I had to decide a point somewhat similar to this. It was an appeal from the registrar. My view is that where the Court is asked, with a perfectly open mind, to deal with a case where there is in a sense contradiction, the Court is entitled to put absolutely aside anything which is pleaded if the side to which the amount tendered is offered refuses it. As in the case to which I have referred, so here, if the offer or tender had been accepted the whole of the costs of this litigation, so far as the *Islegarth* is concerned, would have been saved; but the *Islegarth* did not care to accept the tender, and therefore I am entitled to treat the case as if there had been no tender. My view about this part of the case, namely, the damage sustained by the *Islegarth*, and the consequent demurrage, and the claim made against her by the *Elf* for salvage services, is, that it is a matter of Aye or No, Does the Court think that that damage and the consequent results were due to the *Islegarth's* own carelessness, as pleaded, or was it an unavoidable accident which occurred to her in the course of her salvage operations? Now, as I have said, the wind had dropped, and it was only force 4, and she had got hold of this vessel, but the *Hercules* was also working to get salvage out of her, and it looks to me very much as if the *Islegarth* and the *Hercules* were trying to jockey each other, with the result that the *Islegarth* got into this position of difficulty, and had her mast, wheelhouse, &c., carried away.

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(1) [1908] P. 162.

In the circumstances I am of opinion, and the Elder Brethren agree with me, that the damage was not a consequence of the salvage operations in the ordinary sense of the word, but was due to the conduct of those on the *Islegarth* alone; and that the plea is a good one that it was due to their own carelessness and want of seamanship in manœuvring the *Islegarth*. The result is that I am of opinion that those items of the *Islegarth*'s claim cannot be allowed, and the case comes back to the simple question of salvage. Upon that I award 50*l.* to each of these vessels.

The result is that there will be an order for payment out of court of 50*l.* to each of the two plaintiffs, the remaining 50*l.* to be repaid to the defendants, and as the bail demanded (1000*l.* by each of the plaintiffs) was excessive, the bail fees over 500*l.* in each case must be paid by the plaintiffs. All questions of costs reserved.

On the question of costs:—

April 9. *Lauriston Batten, K.C.*, and *Lewis Noad*, for plaintiffs, the owners, master, and crew of the *Hercules*.

Aspinall, K.C., and *D. Stephens*, for plaintiffs, the owners, master, and crew of the *Islegarth*. In *The Mona* (1), a case of damage by collision, it was held that the provisions of Order XXII. of the Rules of the Supreme Court, 1883, did not affect the admiralty practice as to tender, and in *The Chiltonford* (2) r. 1 of the same order, as to payment into court with a denial of liability, was held not to apply to salvage actions; but r. 1 was amended in July, 1901, and Order XXII. made to include "an admiralty action." Since that date the interpretation put upon the rules of this order by the case of *Wagstaffe* v. *Bentley* (3), which was worked out in *Powell* v. *Vickers, Sons & Maxim, Ld.* (4), and followed in *Fitzgerald* v. *Tilling* (5), is that the plaintiff, in such a case as this, is entitled, not only to the costs of the action down to payment in, but also to the subsequent costs of issues on which he succeeds. Here both the plaintiffs have succeeded on the issue that they

(1) [1894] P. 265.
(2) [1901] W. N. 48.
(3) [1902] 1 K. B. 124.
(4) [1907] 1 K. B. 71.
(5) (1907) 96 L. T. 718.

rendered salvage services, and the owners, master, and crew of the *Islegarth* have succeeded on the question of agreement or no agreement, for they have obtained an award of salvage in excess of the alleged agreement to tow the *Blanche* off for 20*l.*

Laing, K.C., and *A. D. Bateson*, for defendants, the owners of the *Blanche*, her cargo and freight. In *The William Symington* (1) the defendants, in an action of salvage, denied that the services rendered by the plaintiffs amounted to salvage, and, as an alternative defence, paid money into court. Butt J. upheld the tender, and, in the exercise of his discretion, under Order LXV., r. 1, of the Rules of the Supreme Court, 1883, he gave the plaintiffs their costs up to the date of payment into court, and the defendants those subsequent to that date. Although this was not quite in accordance with the practice in the Queen's Bench Division existing at that time, it has been followed as the general rule in admiralty ever since, and the practice now established under the Rules of the Supreme Court agrees with that existing in admiralty, except that, in admiralty, questions as to specific issues, such as those dealt with in the King's Bench cases cited on behalf of the plaintiffs, do not arise, for in a salvage action, as distinct from the pleadings at common law, the practice is to set out in the statement of claim the whole of the facts upon which reliance is placed.

The result, therefore, is that as the Court has found that, so far as the *Hercules* is concerned, the tender of 50*l.* is adequate, the Court will apply the ordinary rule, and, in awarding that sum to that tug, give her owners, master, and crew their costs up to the payment into court and the defendants their costs subsequently incurred, and there, so far as that tug is concerned, the matter will end. With regard to the *Islegarth* the defendants have brought into court 100*l.* by way of tender, that is, 20*l.* in the event of the Court finding that an agreement for that sum was entered into, and 80*l.* in the event of the Court finding that the defendants were liable for the damage sustained by the *Islegarth*; but the Court has found that no agreement to tow the *Blanche* off for 20*l.* was made, and that the damage which the tug sustained by coming into collision with the *Blanche*, involving the assistance of the tug *Elf*, was due to her own carelessness, and is, therefore, no concern of the defendants. Finally, the Court has decided that 50*l.* is a sufficient award for any salvage service rendered by the *Islegarth*, and, therefore, that the balance of 50*l.* tendered, over the amount of salvage awarded, must, under Order XXII., r. 6 (*c*), be repaid to the defendants. The result, it is submitted, is that the *Islegarth* will get her costs up to tender, and the defendants their costs subsequent to that date, no question of issues arising in an action of this nature; but, in view of the small sum awarded, it is suggested that the plaintiffs are only entitled to costs on the county court scale.

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(1) (1884) 10 P. D. 1.

BARGRAVE DEANE J. I see considerable difficulty in applying the principle laid down by the Court of Appeal in the case of *Fitzgerald* v. *Tilling* (1) to an admiralty action. I quite agree that in an admiralty action, after the plaintiffs have set out in their statement of claim the whole of the circumstances of the case, the defendants may conclude their pleading, as in this case, by saying, "Arising out of the whole of the circumstances of the case we say no salvage, and, if anything is to be paid, we pay one of you according to the contract entered into."

Now the Court has found that there was no contract established, and the Court has found that it was a case of salvage of a small character; and in the case of one of the vessels has found that the tender is exactly right, and in the case of the other that it is in excess of what was due for salvage. The rule is that in the case of a tender the plaintiff recovers the costs up to the date of the tender, if the tender is upheld, and the tenderer recovers the costs subsequently incurred. That seems to me a very reasonable rule to apply in this case, more particularly having regard to the rapidity with which the case came on for trial.

It seems to me that the general rule applies, and that the plaintiffs should have the costs up to tender, and the defendants should have their costs subsequent to the tender; and then I think I shall direct the registrar, following the principle laid

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(1) 96 L. T. 718.

1908

THE BLANCHE.

Bargrave Deane J.

down in the Court of Appeal, that if he can sever any costs—I do not see how he can in this case—if he can sever any costs, as representing the dispute as to whether it was towage or salvage, or whether there was a contract or no contract, from the general costs of the action, he should deal with this case according as the issues were found in favour of one party or the other. I do not see how it can be done in this particular case, but I can conceive that it may be done in other cases, and it is my duty to follow the principle laid down in the Court of Appeal. If I said it could not be done, it might be that the Court of Appeal would say afterwards, "You should have left it to the registrar to say whether it could be done." I do not think that in this case I will limit the costs to the county court costs. I agree the figures are small, but I think the case was one for this Court.

Solicitors for plaintiffs (the *Hercules*): *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for plaintiffs (the *Islegarth*): *Downing, Handcock, Middleton & Lewis, for James Inskip & Son, Bristol.*

Solicitors for defendants (the *Blanche*): *William A. Crump & Son, for Gilbert Robertson, Cardiff*

T. L. M.

THE ETNA.

1907
Dec. 11, 12, 13, 16.

Admiralty—Collision—Single Ship and Fleet of Warships—Crossing Rule—Special Circumstances—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 27—*King's Regulations, ch. xiv.*, 615 (6.) (11.)—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 741.

A flotilla of torpedo-boat destroyers, proceeding down the English Channel in two lines of close formation, sighted the masthead and red lights of a merchant steam vessel drawing across the head of the starboard, and approaching the port, division. When in the position of a crossing vessel with regard to the second destroyer of the port division, the officer in charge of that destroyer kept his station until danger was imminent, and then, putting his engines full speed ahead, tried by hard-a-porting to throw his starboard quarter clear, but failed to get across the bows of the merchant vessel. In an action of damage by collision:—

Held by Bucknill J., that both ships were to blame, the merchant vessel for bad look-out, whereby she got in between the two lines of the flotilla, without regard to the Board of Trade notice warning single ships to keep out of the way of a squadron of warships, and then persisted in maintaining her course and speed under art. 21 of the regulations for preventing collisions at sea, when she should have acted under art. 27, and, in the special circumstances, passed down between the two lines of the flotilla. The destroyer was also to blame, for, under the article of the King's Regulations equivalent to art. 19 of the regulations for preventing collisions at sea, it was the duty of the officer in charge, having the merchant vessel on his own starboard side, to keep out of the way, and though he was required under the King's Regulations to keep his station and not change the course, except to avoid immediate danger, and, therefore, was entitled to a reasonable time to see what the merchant vessel would do, he had, in the circumstances, delayed action too long.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the Commissioners for executing the Office of Lord High Admiral of the United Kingdom. The defendants were the owners of the *Etna.*

The case is reported on the question of the relative duties of single ships and warships when the latter are steaming in company.

On January 12, 1907, about 8 P.M., the wind being westerly, light, the weather fine and clear, and the tide last quarter flood running to the eastward with a force of about one knot, a flotilla of ten torpedo-boat destroyers was proceeding from Sheerness to Portsmouth on a course N. 83° W. magnetic, at a speed of fifteen knots, Beachy Head bearing N.W. distant about four and a half miles. The flotilla was in divisions line ahead disposed abeam to port, the divisions being three cables apart, and the ships one cable. H.M.S. *Wear* was the second vessel in the port column, and those on board of her saw, at a distance of about one mile, and bearing about two points on the starboard bow, a white light which proved to be the masthead light of the *Etna*, an iron screw steamship of West Hartlepool, of 1159 tons gross register, 235 feet long, with engines of 110 horse power nominal, manned by a crew of seventeen hands, in the course of a voyage from Valencia to Rotterdam with a cargo of burnt ore.

According to the plaintiffs' statement of claim, shortly after those on board H.M.S. *Wear* had seen the white light, the red light of the *Etna* came into view from two to three points on the starboard bow, and for a few seconds all three lights; then the red light was shut out. The green light continued to be seen until the *Etna* was abreast of the *Ure*, the leading ship of the port column, when her outline became visible to those on board the *Wear*, and as the *Etna* was passing the *Ure* she was observed by those on board the *Wear* to be altering her course rapidly to starboard, and her red light again came into view. The engines of the *Wear* were at once put full speed ahead so as to pass ahead of the *Etna;* but on its being seen that a collision was inevitable the helm of the *Wear* was put hard-a-port. Immediately afterwards the bow of the *Etna* struck the starboard quarter of the *Wear*, spinning her round. The engines of the *Wear* were at once stopped.

The plaintiffs alleged that those in charge of the *Etna* improperly attempted to proceed across and through a flotilla of warships steaming in company, that they violated art. 21 of the regulations for preventing collisions at sea by altering their course to port so as to shew the green light, that in altering the course to starboard they were guilty of negligence, and that they improperly failed to observe arts. 27 and 29 of the same regulations.

The case of the *Etna* was that she was proceeding on a course

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of E. ½ S., making about seven to eight knots, when those on board observed distant about three to four miles, and bearing right ahead, all three lights of a steamship coming down channel. The helm of the *Etna* was slightly ported, one short blast sounded on her whistle, and the helm steadied at E. by S. ½ S., the vessels being then in position to pass all clear red to red. At about the time the helm was ported those on board observed distant about two miles, and bearing about two points on their port bow, the masthead and green lights of several steamships, of which the second proved to be H.M.S. *Wear*. The *Etna* kept her course and speed, and the other steamships were carefully watched, the foremost of them passing safely across the bows of the *Etna*; but H.M.S. *Wear*, still shewing her masthead and green lights on the port bow of the *Etna*, approached at great speed as if attempting to cross the bows of the *Etna* and caused danger of collision. When the vessels were so close that collision could not be avoided by the action of H.M.S. *Wear* alone, the engines of the *Etna* were stopped, and a long warning blast was sounded on her whistle; but, notwithstanding these manœuvres, H.M.S. *Wear* came on at high speed, and with her starboard quarter struck the stem and port bow of the *Etna* a heavy blow, doing her serious damage.

The defendants charged H.M.S. *Wear* with failing to keep out of the way of the *Etna*, with improperly attempting to cross ahead of her, with not duly or in due time putting the helm to port, with not duly or in due time easing or stopping or reversing, and with failure to comply with arts. 19, 22, 23, and 29 of the regulations for preventing collisions at sea as applied in identical terms by His Majesty's Regulations to His Majesty's ships.

Those in charge of the *Etna* admitted, in cross-examination, that they were acquainted with the notice to shipowners and masters, issued by the Marine Department of the Board of Trade, April, 1897, warning mariners that it would be in the interests of safety for single ships to adopt timely measures to keep out of the way of, and avoid passing through, a squadron of warships. (1)

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(1) The notice referred to is set out at p. 275 of the report of *H.M.S. Sans Pareil*, [1900] P. 267.

1907. Dec. 11, 12, 13. The *Solicitor-General* (*Sir W. S. Robson, K.C.*), *Acland, K.C.*, and *W. Wills*, for the plaintiffs. In considering the question of negligence the position of the officer in charge of H.M.S. *Wear* must be taken into account, for, in order to prevent collisions between the warships themselves when steaming in company, the instructions to lieutenants, contained in ch. xiv., art. 615 (6.) and (11.), of the King's Regulations, require the station to be kept, unless a deviation becomes necessary to avoid immediate danger ; but, according to paragraph 3 of the defence, it was not until "H.M.S. *Wear*, still shewing her masthead and green lights on the port bow of the *Etna*, approached at great speed as if attempting to cross the bows of the *Etna*" that danger of collision was caused, and, therefore, up to that time it may be taken that there was no danger, so that the officer of the watch was not wrong in postponing action till then. This point is specially dwelt upon in the judgment of the Master of the Rolls in the case of *H.M.S. Sutlej.* (1) The learned judge, after referring to the portions of the King's Regulations dealing with this subject, says : "Obviously there were two duties upon the officer in charge of the *Sutlej*. He had to respect, so far as possible, the rules of navigation, and also to respect the ordinances specially formulated for his guidance as forming part of a squadron. He had to conciliate the two in a reasonable way." It is submitted that, in this case, as a matter of seamanship, the officer in charge of H.M.S. *Wear* acted soon enough to avoid immediate danger consistently with his duty to preserve his station as long as possible.

It must also be borne in mind that by s. 741 of the Merchant Shipping Act, 1894, the provisions of that Act do not apply to ships belonging to His Majesty, and, therefore, although the King's Regulations are precisely similar to the regulations for preventing collisions at sea, the statutory penalty, imposed by s. 419, sub-s. 4, of the Act, would not arise in respect of the infringement, if any, of such of the regulations as are involved in this case : see the observations of Gorell Barnes J. in *H.M.S. Sans Pareil.* (2)

The collision was brought about by the initial error of the *Etna* in improperly attempting to break through the port line of the flotilla, although those in charge were aware of the Board of Trade notice warning single ships to avoid passing through a squadron of warships, and the immediate cause of the collision was due to the *Etna* improperly altering her course to port and then to starboard so that those in charge of H.M.S. *Wear*, though they made every effort, were unable to avoid her.

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(1) (1905) 21 Times L. R. 325.

(2) [1900] P. 267, at p. 273.

Laing, K.C., and *Hugh C. S. Dumas*, for the defendants. This collision took place near the *Royal Sovereign* lightship, where strings of vessels are continually passing, and there was no special light or other indication to shew that H.M.S. *Wear* was one of a flotilla of ten destroyers proceeding in a particular formation, so that although those in charge of the *Etna* admit that they knew of the notice issued by the Board of Trade by way of advice to merchant vessels to adopt timely measures to keep out of the way of a squadron, still there was not, in the circumstances, any negligence in getting in amongst the warships, even assuming that the Board of Trade notice has any binding force. Having got into that position, the *Etna* and H.M.S. *Wear* found themselves, at the material time, on crossing courses, and the officer in charge of His Majesty's ship was bound to get out of the way: *H.M.S. Sans Pareil* (1); that is to say, the case comes under the common law rule as to contributory negligence, by which, though those in charge of the *Etna* may have been guilty of negligence in getting in between the divisions, and although that negligence may in fact have contributed to the collision, yet, if the officer in charge of H.M.S. *Wear* could in the result, by the exercise of ordinary care and diligence, have avoided the collision, the negligence of those in charge of the *Etna* will not excuse him: *Radley* v. *London and North Western Ry. Co.* (2)

This principle as to the proximate cause of the loss was laid down in the case of a collision between two ships in *Cayzer* v. *Carron Co.* (*The Margaret*) (3), where one ship was held to be in fault because with ordinary care she could have avoided a collision, notwithstanding the negligence of the other: see also *H.M.S. Melampus*. (4)

(1) [1900] P. 267.

(2) (1876) 1 App. Cas. 754.

(3) (1884) 9 App. Cas. 873.

(4) *Ship. Gaz.*, Dec. 22, 1903.

Acland, K.C., in reply. The *Etna* having got in between the two divisions of the flotilla should, as a matter of seamanship, not have suddenly ported to get through the port division, but have straightened down the line, in which case those in charge of H.M.S. *Wear* would have had no difficulty in avoiding her.

Cur. adv. vult.

Dec. 16. BUCKNILL J. In this case the steamship *Etna* came into collision with H.M. torpedo-boat destroyer, the *Wear*, on the evening of January 12, 1907, in the English Channel, between Beachy Head and the *Royal Sovereign* lightship. Before and at the time of the collision, which happened a few minutes after 8 o'clock, the *Wear* and nine other torpedo-boat destroyers were proceeding down channel in two lines, or divisions, about three cables apart from each other. The northern or starboard division consisted of (1.) the *Nith*, commanded by the commander of the flotilla; (2.) the *Ernest;* (3.) the *Panther;* (4.) the *Exe;* (5.) the *Griffon.* The port or southern division consisted of (1.) the *Ure*, leading vessel; (2.) the *Wear;* (3.) the *Swale;* (4.) the *Ness;* (5.) the *Quail.* When the *Royal Sovereign* lightship was abeam, Commander St. John, on the *Nith*, signalled the flotilla to alter course to N. 83° W. (equal to about W. ¾ N.), "leaders first and remainder in succession." That signal was answered by every vessel, and the order was obeyed, and I find that that course was being steered by the flotilla at the time of the collision between the *Wear* and the *Etna*, and that at the moment of collision the *Wear* was still heading W. ¾ N., or a very little to the north of it, if anything. This would make the *Etna* to be heading about S.S.E., or between five and six points off her up-channel course.

The question is, Which of these two vessels is to blame for this collision, or whether both have materially contributed to it? The Court has found it very difficult to arrive at a conclusion as to the facts, seeing that the case for the plaintiffs has been presented to it by witnesses who, whilst the Court believes them to have been for the most part honest, have nevertheless been in apparent disagreement with each other on some important points, and that the case for the defendants has been blemished by statements which were incorrect, and, I must add, which I think were intentionally incorrect, on material matters.

The first witness called by the plaintiffs was Mr. Dudley, a gunner, who relieved Lieutenant Phillips, in command of the *Wear*, at 7.40 P.M., he having left the bridge at that time and gone below. Mr. Dudley, a quartermaster, and a signalman were on the bridge, and an A.B. was forward on the look-out. Mr. Dudley's evidence was that at five minutes past 8 he saw the *Etna's* masthead light two points on the starboard bow, and about a mile away; that shortly afterwards her red light came into view at the same bearing and distance; and the next he saw was the green light coming into view, and the red was shut in, distance still about a mile off, but when bearing three to four points on his starboard bow, and about abreast of the *Ure*, she came round as if under a port helm, and appeared to be trying to cross ahead of the *Wear;* so he ordered his engines to be put full speed ahead to avoid being hit amidships by the *Etna*, and then, seeing that a collision was inevitable, he put his helm hard-a-port to make the blow a glancing one; but the stem and port bow of the *Etna* struck the *Wear* on the starboard side about forty feet from the stern, at an angle of from four to five points leading aft, and penetrating as far as her middle line. Mr. Dudley said on re-examination that he kept his course until just before the collision.

The *Wear* was out of station before and at the time of collision, and was probably more so than the distance Commander St. John estimated her to be, which was about one cable. Her proper station was one cable between her and the *Ure*, which was ahead of her. It was stated by Mr. Dudley, I think, that a signal of reprimand had come from the *Nith* on the subject shortly before the collision. Roberts, acting quartermaster on the *Wear*, was at the wheel, and he proved that the *Etna* was close to the *Wear* when he got the order "Hard-a-port"; and on cross-examination he said that the *Wear* was crossing the *Etna's* head when thirty to fifty yards from her. Gaiger, signalman on the *Wear*, whose duty it was to look out for signals, but particularly from the *Nith*, said that he first saw the masthead light of the *Etna* two to three points on the starboard bow, and then he saw her red; that the red was shortly after shut in; and when the *Etna* was about abeam of the *Ure* she seemed to be porting, for her red light came into view again. He expressed an opinion that if the helm of the *Wear* had been ported earlier there would not have been a collision, but I do not attach much importance to this statement from a witness whose knowledge of navigation may be of no value. The evidence of the look-out on the *Wear* was generally corroborative of Mr. Dudley's evidence. The engineer of the *Wear* stated that he felt the shock of the collision immediately after he had put the engines full speed ahead. Commander Hawkesley, of the *Ure*, the leading vessel of the port division, first saw the masthead light of the *Etna* half a point on his starboard bow, five miles off; then he saw the green, two points on the same bow, two miles off, and it got broader. When the *Etna* was abeam of the *Ure* he saw that she was porting, as if trying to pass between the *Ure* and the *Wear*. He never saw the red. Commander St. John, of the *Nith*, who commanded the flotilla, stated that he first saw the masthead light of the *Etna* about five miles off and about ahead. The next he saw was her red light, about two points on the starboard bow and about three cables distant. He then ordered his helm to be hard-a-ported, and sounded the siren as an indication to the flotilla that he was porting. He then steadied the *Nith* on her course, having passed under the *Etna's* stern, and then saw that she seemed to be under the influence of a port helm. Lieutenant Seymour commanded the *Ernest*, the second in the starboard division. He first saw the masthead light of the *Etna* nearly ahead, and about four miles off. Then he saw her red one and a half miles off and half a point on the port bow. The helm of the *Ernest* was ported to follow the *Nith*, but at that time the *Etna* was four points on the port bow of the *Nith* and the *Ernest*, and not on the starboard bow, and he thought that the *Ernest* was on an opposite course, and he could not understand why the *Nith* ported three points. Lieutenant Seymour said that he then saw the *Etna* was porting as if she was trying to cross the bows of the *Wear*.

An attack was made by Commander St. John on the quality of the *Etna's* red light as accounting for not having seen it before; but, whether it was efficient or not, it was seen by Mr. Dudley, on the *Wear*, at the distance of a mile, and he made no complaint of it. The siren signal from the *Nith* was said not to have been heard by the witnesses to whom I have referred, which seems to me to be extraordinary, but I accept the evidence of Commander St. John on this point.

It is extremely difficult to reconcile the evidence of Commander St. John with the evidence of Commander Hawkesley, Lieutenant Seymour, Mr. Dudley, and others as to the bearing of the *Etna's* lights with regard to the *Nith*, for it would appear that if the last-named witnesses are correct the *Etna* never could have been on the starboard bow of the *Nith;* but as I have to choose between the two statements I prefer to rely on the evidence of the commanding officer of the flotilla, who was at his post, and having in his hands the responsibility for the movements of the whole flotilla, and who is, in my opinion, more likely to be right in his recollection of what he says he saw, and upon which he acted, than are those whose responsibilities were less important. It also seems to me that it would have been almost impossible for the *Etna* to have turned round as much as she did under a port helm before this collision if she only began to do so when she was abeam of the *Ure;* whereas there is no improbability about it according to the evidence of Commander St. John. But on his evidence there is, on the other hand, this difficulty. If the *Etna* was on his starboard bow, then, considering the distance between the *Etna* and the *Wear* and the respective speeds (fifteen and eight knots), it would look as if the *Wear* would have been a crossed ship before the *Etna* could have reached her. I think it is very likely that the *Wear* was farther astern of the *Ure* than Mr. Dudley admitted.

The fact still remains, that wherever the *Etna* was before the acting officer on the *Wear* saw her red light the second time, he did not see it then until she was abreast of the *Ure*, and then she appeared to be under the influence of a port helm. What he did then was to go full speed ahead, and the reason he gave for so doing was that if he had not she would have hit him amidships. Then, seeing that the collision was unavoidable, he ordered the helm hard-a-port, but there was clearly no time for her head to alter before the collision happened. The plaintiffs' case therefore came to this—that the *Etna* got in between the two divisions, and then, instead of steering between them, when she would have been safe, suddenly ported to get out between the *Ure* and the *Wear;* that the action of the *Etna* was so sudden and unexpected that those on the *Wear* were unable to avoid the collision, and that what was done on the *Wear* did not contribute to it, nor could they by reasonable care and skill have avoided the consequences of the initial negligence of those on the *Etna*.

Of the defendants' case it is not necessary to say much, for I disbelieve it, but I must refer to the evidence given in support of it. At 8 P.M. the *Etna's* course was E. ½ S. At 7.50, the second mate being on the bridge, the three lights of a steamship were seen right ahead and about three miles off. The helm of the *Etna* was ported one point, and then, and before the helm was steadied, the green and masthead lights of several steamships were observed about two points on the port bow and about two miles distant. The second mate took them to be merchant ships, but they turned out to be the port division of the flotilla. He said that he kept his course of E. by S. ½ S., at which he had steadied after porting for the merchantman, and he judged that those vessels shewing their green lights to him were heading S.W. or S.W. by S. When he was relieved by the chief officer at 8 o'clock he said the nearest of those vessels was one to one and a half miles off, and the merchantman was abeam on his port side. It was then stated that as the *Etna* and the port division drew nearer to each other the first one (the *Ure*) crossed the *Etna's* bows safely, but the second one (the *Wear*), which was two or three ship's lengths behind the first, looked as if she was holding on her course without attempting to avoid the *Etna*, so the *Etna's* engines were stopped and a long blast was blown on her whistle; but the vessels came into collision, the heading of the *Etna* at the moment of collision being, it was said, still E. by S. ½ S., which was the course on which the helm was steadied after porting one point. The second mate said he never saw any of the vessels forming the starboard division, and he believed that they were not there, or he must have seen them. The impression made on me by this witness was very unfavourable. In the first place he could not have seen the green lights of the *Ure* and *Wear* on his port bow if his vessel was heading E. by S. ½ S. and if the *Ure* and the *Wear* were heading W. ½ N., which it is admitted they were. In the second place he must have seen the vessels in the starboard division when the *Ure* crossed the bows of the *Etna*, which it is admitted she did; and in the third place the so-called merchantman for which he ported could not have been there if the rest of his evidence as to distances is correct, for he ported for her when she was two to two and a half miles off, and as he ported, and before he steadied, he saw the lights of the *Ure* division two miles off, and yet when the merchantman was abeam of him the *Ure* was still one to one and a half miles off. I entirely disbelieve the story about the merchantman, as I do about the starboard division not being seen by the second mate of the *Etna*. The chief officer of the *Etna*, who went on the bridge at 8 o'clock, said that the *Ure* division was heading S.W., and that the *Etna* was on an E. by S. ½ S. course and was kept on it. He also had his attention drawn to the merchant ship when abeam, and said that the masthead and green lights of the *Ure* division were one to two miles away and bearing one to two points on the *Etna's* port bow; but he saw, or said he saw, what the second mate said he never saw and which he believed was not there—that is, some red lights on the port bow, which, I doubt not, were those of the *Nith* division. On cross-examination he admitted that he knew of the Board of Trade note of advice to single ships approaching squadrons, but said he did not know that the vessels following the *Ure* were torpedo-boats until just before the collision. I cannot accept this statement, for it is inconceivable that a man in his position should have thought that five steamships carrying electric masthead lights and being in line formation were ordinary merchant vessels. The conclusion to which I have come is that the defendants' case is an untrue one, and I reject it. As to the course of the *Etna*, I accept it to have been E. ½ S. before the *Ure* division was first seen, but I find that after that time, and before the collision with the *Wear*, the course was altered by porting, and that just before the collision the *Etna* was heading about S.S.E., nothing to the eastward of it, and that she was under the influence of a port helm at the moment of collision. I have asked the Elder Brethren if this porting was in the circumstances negligent navigation, and their answer is in the affirmative. I have no doubt that it was and that it contributed materially to the collision.

To account for the *Etna* being so much to the southward of her course it was suggested that her compasses may have been affected by her cargo of ore, but I cannot accept that supposition. It is impossible to say with certainty what led to so much porting on that ship, but I suspect strongly that the first porting was for the *Nith*, the so-called merchant ship, which had no existence, and that the *Etna* was more or less under the influence of a port helm from that time up to the collision. Then came the difficulty in which the officer in charge of the *Wear* found himself. His ship was already out of station by being too far astern of the *Ure*; he was bound by the Admiralty regulations not to change his course, except to avoid immediate danger, unless ordered to do so; and he was also bound, so far as good seamanship dictated it, to keep out of the way of a vessel on his starboard bow, and also to avoid crossing ahead of her if he could help it.

I cannot accept the evidence that the *Etna* suddenly and when but a short distance from the *Wear* ported her helm, shutting in her green, which, it was said, was up to then open to the *Wear*, because from the time when the *Nith* ported for the *Etna* I find that the red, and not the green, was open to the *Wear*. If those on the *Wear* had ported to that red light when it could have been first seen on their starboard bow, it is probable that no collision would have happened, provided the *Etna* had kept her course; but I think that in the circumstances the officer on the *Wear* was entitled to wait for a reasonable time to see if the *Etna*, which had got in between the two divisions, intended to continue and to cross the port division, or to starboard and go between it and the starboard division. But he was also bound not to wait until a collision was imminent, and that he unfortunately did, because the *Etna* still came on as if to pass ahead of the *Wear*, that is, between the *Ure* and the *Wear*; and it was not until the officer in charge of the *Wear* thought that unless he went full speed ahead his ship would be run into by the *Etna* that he gave that order. That was waiting too late, and although he nearly cleared the *Etna* he just failed by forty feet.

It having been agreed in this case, and for the reasons which were given in *H.M.S. Sans Pareil* (1), that the rules of the common law as to contributory negligence must apply, and not the penalty clauses of the statute law as to disobedience of a statutory regulation, learned counsel for the defendants argued that, even if those on board the *Etna* had been guilty of the initial negligent navigation, the result—that is, the collision—could nevertheless have been avoided by the exercise of ordinary care and skill on the *Wear*. That has not been made out to my satisfaction. In some cases it is easy to determine that the negligence of the initial wrong-doer could have been avoided by the other party, but it is frequently a matter of extreme difficulty to decide, and here I am unable to do so.

I am of opinion that the navigation of the *Etna* was negligent in getting in between the two divisions of the flotilla. I say I find that, because I find as a fact that the *Etna* ported for a vessel which she called the merchantman, but which was, I suspect, in point of fact the *Nith*, and that she ought to have had a better look-out than she had; and not seeing, as she maintains, the starboard division of the flotilla at all, I hold that her navigation was negligent. As Romer L.J. said in *H.M.S. Sans Pareil* (2), prudence dictated that the tug and tow should not have attempted to cross in front of the squadron, and so here, under art. 27 of the regulations, I think that, the *Etna* having got there, a departure from arts. 19 and 21 was necessary to avoid immediate danger. But those on the *Etna* persisted in holding on under a port helm. So also those on the *Wear* were negligent in acting too late to avoid the *Etna*, and the result was that the collision was brought about by the combined negligence of both ships.

(1) [1900] P. 267.

(2) [1900] P. 267, at p. 289.

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I pronounce both vessels to blame, and give the plaintiffs leave to amend by adding the officers and crew of H.M.S. *Wear* as plaintiffs in respect of their lost effects, the costs, if any, of the amendment to be defendants'.

Solicitor for plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom: *The Treasury Solicitor.*

Solicitors for defendants, the owners of the *Etna: Thomas Cooper & Co.*

T. L. M.

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March 26; *April* 6, 15.

LORRIMAN *v.* LORRIMAN AND CLAIR.

Divorce—Practice—Property of Guilty Wife—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45*—Settlement—Principles and Extent of Jurisdiction.*

The principles which should guide the Court in ordering a settlement out of the property of a guilty wife under the powers conferred by s. 45 of the Matrimonial Causes Act, 1857, are similar to those adopted in cases of variation of settlements under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), but the Court has power, under s. 45 of the Act of 1857, to deal with capital, whether in possession or reversion, as well as with income.

The Court, in ordering a settlement under s. 45, should have regard to the pecuniary position which the husband and child or children would have been in if the marriage had not been dissolved through the fault of the wife, and should endeavour, as far as may be, to adjust any alteration made in their pecuniary position by reason of the change in their circumstances due to the wife's misconduct and the consequent dissolution of the marriage.

THIS was the husband's petition, under s. 45 of the Matrimonial Causes Act, 1857, for a settlement of property of his guilty wife, the marriage having been dissolved by reason of her misconduct.

There was one child of the marriage, a daughter, born in November, 1892, and now in the custody of the petitioner.

The present income of the petitioner was about 400*l.* a year and a voluntary allowance from the respondent's mother, amounting to 560*l.* a year, but the petitioner stated that the latter would cease on an order being made by the Court on the present petition.

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The income of the respondent was about 1000*l.* a year at the present time; and she had an absolute reversion, expectant on the death of her mother, aged about sixty, to a capital sum of about 47,000*l.*, and also a life interest, also expectant on the death of her mother, in another sum of about 63,000*l.*, the capital of which would go to the child of the marriage on the deaths of the child's grandmother and mother. The registrar, in his report, recommended "that an order should be made upon the respondent to execute a settlement and that it be referred to conveyancing counsel to the Court to settle the necessary deed or deeds for this purpose of her property in possession and in reversion, whereby she shall secure to the husband for the maintenance and education of the child, until she shall attain the age of twenty-one years or marry, the sum of 200*l.* a year; and that, with regard to the sum of 47,000*l.*, she shall secure one-fifth of the income to the husband for his life and one-fifth to the husband until the child attain the age of twenty-one or marry and upon the child attaining the age of twenty-one or marrying the capital sum representing such one-fifth shall go to the child absolutely. As regards the sum of 63,000*l.*, it is submitted that a settlement should be made of one-fifth of the respondent's interest thereunder to the husband during the joint lives of petitioner and respondent, and of a further one-fifth for the child during the joint lives of the child and the respondent, but that, as to this last mentioned one-fifth, the income should be payable to the husband so long as he has the custody of the said child and thereafter to the child, or as the Court may direct. The provisions with regard to the two reversionary interests of the respondent should come into operation on the death of the respondent's mother."

The petitioner gave notice of motion to vary the report by directing "that the respondent do execute a settlement, and that it be referred to one of the conveyancing counsel of the Chancery Division to settle the necessary deed or deeds whereby she shall, out of her property in possession and reversion, secure:—

"(*a*) To the petitioner for his life the sum of 250*l.* per annum, and thereafter to the child of the marriage absolutely.

"(*b*) To the petitioner or to the guardian for the time being of the child of the marriage for the maintenance and education of the said child until she shall attain the age of twenty-one years or marry under that age the sum of 150*l.* per annum. If and when the said child shall attain the age of twenty-one years or marry under that age, the said sum of 150*l.* per annum to the said child absolutely.

"As to the said sum of 47,000*l.*—

"(*c*) One-fifth of the income thereof to the petitioner for life. If the child of the marriage shall survive the petitioner, the capital of the said one-fifth to the child.

"(*d*) One-fifth of the income thereof to the petitioner or to the guardian for the time being of the child of the marriage for the maintenance and education of the said child until she shall attain the age of twenty-one years or marry under that age. If and when the said child shall attain the age of twenty-one years or marry under that age, the capital of one-fifth of the said sum of 47,000*l.* to the said child.

"As to the said sum of 63,000*l.*—

"(*e*) One-fifth of the income to the petitioner during the joint lives of himself and the respondent. After the death of the petitioner, if the respondent should survive him, the income of the said one-fifth to the child of the marriage during the life of the respondent.

"(*f*) One-fifth of the income to the petitioner during the joint lives of himself and the respondent, for the maintenance and education of the child until she shall attain the age of twenty-one years or marry under that age; and thereafter during the life of the respondent to the child of the marriage.

"Or such other order as to this Honourable Court may seem meet."

The respondent filed a cross notice of motion, asking that the report of the registrar should "be confirmed, with the following modifications, namely:—

"1. That the provision thereby recommended for the daughter of the petitioner and respondent until she attain twenty-one years or marry should be secured by her to trustees to be agreed upon by the respective solicitors, or, in default of

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agreement, that such trustees be nominated by this Honourable Court.

"2. That the respondent be at liberty to apply to vary the deed of settlement to be made herein, so far as it is to be made (if at all) in favour of the petitioner personally, in the event of his becoming entitled hereafter, under any deed, will, or settlement, to a sum or sums amounting to 10,000*l.* or more, or property or investments representing the said amount or to the income arising therefrom: And

"3. That the petitioner be ordered to pay the costs of this motion."

At the first hearing of the petitioner's motion, his counsel read a transcript of the official shorthand note of the evidence given by the petitioner at the hearing of the undefended suit for divorce, in the course of which he had stated that some time after the date of the marriage in 1891 he, at the request of the respondent, had given up a business which he had theretofore carried on.

Objection was taken to the reading of this evidence on the motion, as it had not been tendered before the registrar; and, the Court having overruled the objection, an adjournment was asked for to enable the respondent to file an affidavit on the particular point referred to. The petitioner filed an affidavit in reply.

Barnard, K.C., and *Le Bas*, for the petitioner. The object of s. 45 is to enable the Court to place the petitioner and his child, as far as possible, in the pecuniary position which they would have occupied but for the respondent's misconduct. The principles which should guide the Court in cases under s. 45 are similar to those laid down for its guidance in dealing with cases of variation of settlements under s. 5 of the Matrimonial Causes Act, 1859. The provision made by the Court under s. 45 is a settlement of property, and not merely an allowance. The settlement to be ordered for the child ought not to be limited to her minority. [They referred to *March* v. *March and Palumbo* (1); *Bacon* v. *Bacon* (2); *Noel* v. *Noel* (3);

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(1) (1867) L. R. 1 P. & M. 440, 443.

(2) (1860) 2 Sw. & Tr. 86.

(3) (1885) 10 P. D. 179.

Ponsonby v. *Ponsonby* (1); *Midwinter* v. *Midwinter* (2); *Hartopp* v. *Hartopp*. (3)]

Durley Grazebrook and *James Rolt*, for the respondent. The cases decided under s. 5 of the Matrimonial Causes Act, 1859, on petitions for variation of settlements afford no guide to such a case as this. It was never intended that a petitioner should make a profit out of his wife's shame. There is no precedent for dealing with capital, and any order the Court may make should be confined to income.

The respondent does not object, if the Court sees fit, to an order that the allowance to be made for the child should not be limited to the child's minority, though it is open to question whether it is desirable that a child should be placed in a position of absolute independence on attaining twenty-one. This was pointed out by Lindley L.J. in *Savary* v. *Savary* (4), where the Court was dealing with income only.

Whatever provision is made for the child ought, in her interests, to be payable to or vested in trustees. There are only two or three reported cases under s. 45 in the whole half-century of this Court's existence. As to the cases cited here on behalf of the petitioner, the facts and figures were nothing like those in the present instance. *Midwinter* v. *Midwinter* (2) proceeded on a case which has since been held to be bad law. In *Hartopp* v. *Hartopp* (3) there were eight children, and this fact is specifically referred to in the judgment. In *March* v. *March and Palumbo* (5) the husband had no property which produced him an income. In *Bacon* v. *Bacon* (6) the amount settled upon the child was made payable to trustees and was not entirely under the control of the petitioner. In the present case the respondent could have left the whole of her property away from the petitioner and their child, if she had thought fit, and he ought not to be placed in a better position than he was in at the time of the marriage, especially as a substantial part of the estate from which his present income of 400*l*. is received (apart from the voluntary allowance from the respondent's

(1) (1884) 9 P. D. 122.
(2) [1893] P. 93.
(3) [1899] P. 65, 72.
(4) (1898) 79 L. T. 607.
(5) L. R. 1 P. & M. 440, 443.
(6) 2 Sw. & Tr. 86.

mother) was derived from property which the respondent had given to him during the continuance of the marriage.

Cur. adv. vult.

April 15. Bucknill J. In this case the petitioner, who has obtained from this Court a decree dissolving his marriage with the respondent, prays that the Court will order such a settlement of the respondent's property as is reasonable for his benefit and for that of the only child of the marriage, a girl who was born on November 25, 1892.

The recommendations of the registrar before whom the matter came are objected to both by the petitioner and the respondent.

The parties were married in 1891. A decree nisi for the dissolution of the marriage was pronounced by this Court on July 16, 1907, the suit being undefended, and this Court gave the custody of the child of the marriage to the petitioner. On January 27, 1908, the decree was made absolute.

This case was partly heard before me on March 30, when, on the application of the respondent's counsel, it was adjourned that she might file an affidavit contradicting the evidence given by the petitioner when I pronounced the decree nisi (the case being undefended), that five years after their marriage he gave up his business as a cotton manufacturer at her special request to travel about with her, during which time she made the acquaintance of the co-respondent.

That affidavit was filed, but it is not necessary in my judgment to go into the matter of difference between them, because it in no way affects the opinion I have formed on the main question, except that whatever income was derived from the petitioner's business could not, of course, continue when the business ceased to exist.

This petition is presented under s. 45 of the Act of 1857, which provides that, if a divorce is pronounced against a wife on the ground of her adultery and she has property either in possession or reversion, a settlement may be ordered out of such property for the benefit of the innocent party and of the children of the marriage.

It is not an application to vary but to order a settlement in favour of the petitioner and the child of the marriage.

The registrar's report, dated February 17, 1908, states that the respondent's income is about 1000*l.* a year and that the petitioner's income is about 400*l.* a year, to which is at present added the voluntary allowance by the respondent's mother of about 560*l.* a year, which it is said will cease so soon as this Court makes its order herein.

The report states also that the respondent has reversionary interests in a capital sum of about 110,000*l.*, of which as to 47,000*l.* she is entitled absolutely to the capital on the death of her mother, aged about sixty, and as to 63,000*l.* she has a life interest upon her mother's death, and that on the respondent's death the child becomes entitled to the capital.

It is submitted in the report that the respondent should be ordered to execute a settlement whereby 200*l.* a year out of her present income shall be secured to the petitioner for the maintenance and education of the child until she shall attain the age of twenty-one years or shall previously marry.

No submission is made in favour of the husband out of the respondent's present income, and this is one of the objections to the report.

It is then submitted that out of the said sum of 47,000*l.* there shall be secured one-fifth of the income arising therefrom to the petitioner for his life.

This is also objected to, and it is asked that if the child shall survive the petitioner the capital of that one-fifth shall go to her.

The next submission is that a further one-fifth of the income of the said 47,000*l.* shall go to the petitioner until the child shall attain twenty-one or shall previously marry, and that on either of these events the capital sum representing such one-fifth shall go to the child absolutely.

This is not objected to by the petitioner, but it is objected to by the respondent as to the capital.

As to the 63,000*l.* it is submitted that one-fifth of the respondent's interest therein be secured to the petitioner during the joint lives of himself and the respondent, and as to a further one-fifth of her interest that it be secured to the child during the joint lives of the child and the respondent. As to the first of these two submissions the petitioner asks that it may be varied by securing the one-fifth to the child for the life of the respondent if the child survive the petitioner, and as to the second submission it is asked that the one-fifth may be secured to the petitioner during the joint lives of himself and the respondent for maintenance and education of the child until twenty-one years of age or marriage under that age, and thereafter to the child during the respondent's life if she survive the petitioner.

The respondent on her cross motion asks generally that as to any settlement ordered by this Court to be made by the respondent liberty may be given to apply to vary it, in the event of his becoming entitled hereafter under any deed, will, or settlement to a sum amounting to 10,000*l.* or more, or property or investments representing the said amount, or to the income arising therefrom.

In the course of the arguments many authorities were cited, but they all came to this, in my opinion, that the Court has full power to act as it may think it to be reasonable or just in the circumstances of the case.

The underlying principle is that the Court must try to ascertain the nature and extent of the pecuniary change by the wife's criminality, and in order to see that it must look at the probable pecuniary position which the husband, the wife, and the issue of the marriage would have occupied if the marriage had not been dissolved.

As Lord Penzance said in *March* v. *March and Palumbo* (1), "It would be of evil example if this Court were to decide that the entire portion of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman."

And in *Hartopp* v. *Hartopp* (2) the present President (Sir Gorell Barnes) said: "Now, the guiding principle which will be found running through the cases is in my opinion this: Where the breaking up of the family life has been caused by the fault

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(1) L. R. 1 P. & M. 440, at p. 443.

(2) [1899] P. 65, at p. 72.

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of the respondent, the Court, exercising its powers under the above section" (that was s. 5 of the 1859 Act to vary settlements), "ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family had not been broken up."

Sect. 5 of the Act of 1859 was only a further extension of the principle of s. 45 of the Act of 1857: see *March* v. *March and Palumbo* (1), already referred to by me.

No hard and fast rule can be laid down, of course, as to the amount which the guilty party shall be ordered to settle or secure upon the other party and the issue of the marriage if any.

In *Noel* v. *Noel* (2) the Court gave half of the wife's present and reversionary income to the husband for himself and two children of the marriage. There the husband and wife had incomes of about 400*l.* a year each, but the wife was also entitled to property in reversion of considerable value.

In *Midwinter* v. *Midwinter* (3) there were five children of the marriage. The husband's present income was 350*l.* a year and the wife's 1140*l.* The Court ordered her to settle 250*l.* a year on her husband for life and 60*l.* on each of the children for life.

Now, in the case before the Court, the registrar has not proposed any provision for the husband out of the respondent's present income, although he finds as a fact that his income is only 400*l.* a year and hers is 1000*l.* I think this is an omission which must be put right. After giving the matter the best consideration I can, I order that the respondent do execute a settlement of her property in possession only to secure to the petitioner 250*l.* a year for their joint lives, and that of her property in possession and reversion she do settle on or secure to the child 120*l.* a year for the joint lives of herself and the child, such 120*l.* to be paid to the petitioner (not to trustees, as suggested by the cross motion of the respondent) for the maintenance and education of the child until she attains twenty-one or shall marry before that age, and thereafter to the child.

Then as to the 47,000*l.* to which the respondent is entitled

(1) L. R. 1 P & M. 440.

(2) 10 P. D. 179.

(3) [1893] P. 93.

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absolutely on her mother's death, I am asked to order that if the child survives her father, then the capital of the one-fifth of the income of which he is to have a life interest shall go to the child absolutely.

I do not think that this would be reasonable and I do not adopt the suggestion. On this part of the case I adopt the registrar's report.

As to the next submission of the registrar, which is that another one-fifth of the income of the 47,000*l*. shall be settled or secured to the petitioner until the child shall attain twenty-one years or marry before that age, and that on either of these events the capital representing such one-fifth be settled on the child absolutely, I am of opinion that it is a reasonable order to make. I have said that I think it would not be reasonable to give to the child, in the event of her surviving her father, the capital of that one-fifth of 47,000*l*. in the income of which he is to have a life interest, but the difference between the two cases is obvious to me. In the first place it must be remembered that there are no marriage settlements here, and that the parties married, the wife retaining complete control over her own property, and in the second place I think that if the marriage had continued it is probable that the mother would have left to the child an absolute interest in some part of the 47,000*l*., and I hold that to give the child such an absolute interest in the present circumstances is to protect her against loss as a result of the divorce. In the case of *Ponsonby* v. *Ponsonby* (1) the Court of Appeal held that beyond a doubt the Court has, under s. 5 of the Act of 1859, jurisdiction to deal with the capital as well as the income, and I hold that in this there is no difference between that section and s. 45 of the Act of 1857.

Then as to the 63,000*l*. I accept the first submission in the registrar's report and leave it unaltered, and as to the second submission I accept the petitioner's proposal that on the child attaining twenty-one years or marrying earlier the one-fifth of the respondent's interest shall be secured to the child during the respondent's life. In conclusion, and to make the matter clear, I order that in the orders now made in relation to the 47,000*l*.

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(1) 9 P. D. 122.

the word "income" is to be held to mean the actual income to which the respondent may be entitled from time to time, as the case may be.

I cannot accede to the respondent's application that, in the event or events happening by which the petitioner may hereafter become entitled to 10,000*l.* or over, or the income arising therefrom, the settlements now ordered to be made may be varied.

The costs of these applications are to be paid by the respondent.

Solicitors for petitioner: *Rooke & Sons.*
Solicitors for respondent: *Danby, Brooks & Co.*

H. D. G.

[DIVISIONAL COURT.]

1908
May 6;
June 2.

THE SUEVIC.

Admiralty—Stranded Vessel—Part Cargo of Frozen Mutton washed Ashore—Expenses of Burial—Liability of Shipowner—Diseases of Animals Act, 1894 (57 *&* 58 *Vict. c.* 57), *s.* 46.

A British steamship stranded off the Lizard, and from the fore part, which was left on the rocks, a large number of carcases of sheep were washed ashore. These carcases, consisting of mutton free from disease, and frozen when shipped, were buried or destroyed under the direction of the receiver of wreck, with the authority of the Board of Trade, and the expenses thereof were demanded of, and paid by, the local authority:—

Held, that the "owner of the vessel" was liable, under s. 46 of the Diseases of Animals Act, 1894, to repay to the local authority the expenses so incurred, for the words "carcase . . . . washed from any vessel," in sub-s. 2 of that section, were wide enough to include the part cargo in question which was washed ashore.

APPEAL by defendants, the Oceanic Steam Navigation Company, Limited, against a decision of the judge of the Truro County Court in favour of the plaintiffs, the Cornwall County Council, in respect of expenses incurred in the burial or destruction of carcases of sheep thrown or washed from the defendants' steamship.

On November 23, 1907, the plaintiffs commenced an action against the defendants in the Truro County Court, and by their particulars annexed to the summons the plaintiff council claimed "the sum of 52*l*. 8*s*. 9*d*. expenses incurred by the said council under s. 46 of the Diseases of Animals Act, 1894, on account of the burial or destruction, in the month of May, 1907, of a number of carcases of sheep thrown or washed from the defendant company's steamship *Suevic* at or near the Lizard Point."

The defence was as follows:—

"1. The defendants, the owners of the steamship *Suevic*, deny that the plaintiffs were under any liability to pay the sum of 52*l*. 8*s*. 9*d*. to the receiver of wreck or any part of it. 2. The defendants do not admit the description of the cargo the *Suevic* was carrying as given in the plaintiffs' claim, and deny that s. 46 of the Diseases of Animals Act, 1894, has any application to mutton free from disease and frozen when shipped."

The "facts admitted" were:—

"1. That the *Suevic* was wrecked on or about March 17, 1907 (1), at Polbream Cove, near the Lizard. 2. That the cargo of the *Suevic* consisted in part of carcases of frozen mutton. 3. That such carcases of mutton were frozen or dead when shipped, and free from disease. 4. That a large number of such carcases were thrown or washed from the *Suevic* on to the shore at or near Polbream Cove, near the Lizard, where the said carcases were found or recovered shortly after the said *Suevic* was wrecked as aforesaid. 5. That the carcases aforesaid, or the greater part of them, having been recovered by or under the direction of the receiver of wreck at Falmouth, were, in the month of May, 1907, at or near Polbream Cove, near the Lizard, buried or destroyed under the direction of the said receiver of wreck acting with the authority of the Board of Trade. 6. That the said receiver of wreck did demand from, and has been paid by, the Cornwall County Council as the local authority the sum of 52*l*. 8*s*. 9*d*., being the expenses incurred in connection with the burial or destruction of such carcases as aforesaid."

The learned judge of the Truro County Court in the course of his judgment, delivered January 18, 1908, said:—

"This case is important, because it is the first that has been taken under this section, and it has been pointed out that it is important both to the plaintiffs as the local authority and also most important to the shipowners because of the burdens which may be cast on them in cases of wrecks happening with frozen meat in the future. I need scarcely state that neither of those considerations have any effect upon me, and all I can do is to interpret this section of the Act of Parliament, and I do so with greater ease, because I am quite sure whichever side I decide against will take this case to a higher Court.

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(1) See ante, p. 154.

"Counsel for the defendants, in his able argument, has taken me through the Acts of Parliament, beginning with that of 1869, and he has shewn, by reference to many sections, that the purview of the whole of those Acts undoubtedly is for the purpose of preventing and arresting diseases in animals. There cannot be the smallest doubt about that, and it is also admitted that it was in 1875 that the first trade in frozen carcases began to take place, a trade which has increased from very small beginnings to the enormous amount which takes place now between America and Australia and this country. The first of these sections under which this case is brought is found in the Act of 1878, and counsel for the plaintiffs has very properly said it is curious that that section should be put in shortly after the trade in frozen meat had commenced. And then I find that sub-s. 2 was included in the Act of 1886, s. 11, and that when the Acts were finally codified by the Act of 1894 both those sections are put under s. 46, sub-ss. 1 and 2.

"I think there cannot be the slightest doubt that I must find as a fact these things were carcases. I cannot see, taking the English language, how I can come to any other conclusion. Where you say that a vessel has come with so many thousand carcases of frozen meat you do not say anything else. It is a common form. In the shipping lists you see 'So and so a ship has arrived with 50,000 or 60,000 carcases of sheep.'

"The question I have really to decide in this case is, Does frozen meat put on board and free from disease come within the definition of carcases under s. 46, taking into consideration the interpretation? Now counsel for the defendants has argued—and he quoted for the purposes of this case *Nissler* v. *Corporation* *of Hull* (1)—that this section is put in to meet the case where a local authority, under power given, orders the carcases of cattle to be destroyed when they reach the port and taken out to sea outside the three-mile limit mentioned in the Act, and in case the carcases come ashore, then the receiver of wreck is entitled under this section to take steps to get the money paid from the local authority, and the local authority can then recover from the persons who are responsible. But, as I pointed out in the course of the argument, it seems to my mind that if that section is to be limited in that way the receiver of wreck certainly may recover from the local authority, but I do not see how the local authority can ear-mark carcases in order to recover from the shipowner who brought the carcases over. It is perfectly clear, what counsel for the plaintiffs has contended, that the preamble of an Act does not altogether take away from the effect of the absolute section. You can find sections which go beyond the Act, and in this particular Act of 1894 it is said 'for certain purposes and for other purposes.' Taking into consideration the fact of the large increase of this frozen meat trade, I have come to the conclusion that the Legislature must have had it in their mind when they enacted this section. I quite agree that it is by no means a case free from doubt, but from the whole of the case I have come to the conclusion that the plaintiffs are entitled to recover this amount from the defendants with costs."

Bailhache, K.C., and *John B. Aspinall*, for the appellants (defendants), the Oceanic Steam Navigation Company, Limited.

Foote, K.C., and *W. T. Lawrence*, for the respondents (plaintiffs), the Cornwall County Council.

The arguments of counsel sufficiently appear from the judgment of the Divisional Court. In addition to the case mentioned in the judgment of the county court judge, counsel for the appellants, on the question of the liability of a shipowner for expenses of removal of wreck, cited *The Crystal* (2), and on the construction of Acts of Parliament Maxwell on Interpretation of Statutes, 4th ed. pp. 30, 31. Counsel for the respondents, on the question of the construction of statutes, referred to *Hannant* v. *Foulger* (1); *Copland* v. *Davies* (2); *Hughes* v. *Chester and Holyhead Ry. Co.* (3); *Bentley* v. *Rotherham and Kimberworth Local Board of Health.* (4)

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(1) (1880) 5 Q. B. D. 325.

(2) [1894] A. C. 508.

Cur. adv. vult.

June 2. The judgment of the Court (Bucknill and Bargrave Deane JJ.) was delivered by

BUCKNILL J. This is an appeal from the county court of Cornwall (Admiralty Jurisdiction) in an action between the Cornwall County Council, plaintiffs, and the Oceanic Steam Navigation Company. The plaintiff council claims 52*l.* 8*s.* 9*d.*, expenses incurred by them under s. 46 of the Diseases of Animals Act, 1894, on account of the burial or destruction in the month of May, 1907, of a number of carcases of sheep thrown or washed from the defendant company's steamship *Suevic* at or near the Lizard Point. [The learned judge read the "defence" and the "facts admitted" already set out, and continued:—] The Court decided in favour of the plaintiffs, and the question is whether this claim comes within s. 46 of the Diseases of Animals Act, 1894, which is in these terms. It is in two parts. The first part is:—

"Where a carcase washed ashore is buried or destroyed under the direction of a receiver of wreck with authority from the Board of Trade, the expenses thereof shall be expenses of the local authority, and shall be paid by the local authority to the receiver on demand, and in default of payment shall be recoverable with costs by the receiver from the local authority."

And the second part is this:—

"Where a local authority has incurred any expenses under this section on account of the burial or destruction of the carcase of any animal which, or the carcase of which, was thrown or washed from any vessel, the owner of the vessel shall be liable to repay such expenses to the local authority; and the local authority may recover such expenses with costs in the same manner as salvage is recoverable."

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(1) (1867) 8 B. & S. 425, per Blackburn J. at p. 430.

(2) (1872) L. R. 5 H. L. 358.

(3) (1861) 31 L. J. (Ch.) 97, at p. 100.

(4) (1876) 4 Ch. D. 588.

It will be seen that the first part of this section is in the same words as s. 53 of the Act of 1878, and the second part of the section is in the same words as in s. 11 of the Act of 1886, which was an amendment to the Act of 1878, and in that connection an amendment of s. 53 of it.

Historically the first important statute relating to the contagious or infectious diseases of cattle and other animals was passed in 1866 (29 & 30 Vict. c. 2), and that was amended by the Act of 1867 (30 & 31 Vict. c. 125), which was repealed by an Act of 1869 (32 & 33 Vict. c. 70). That Act dealt for the first time with the burial of diseased animals by local authorities (s. 60). It also required railway companies to provide water and food for any animals carried by them (see s. 64). Therefore there was something else introduced into that Act than that which merely referred to the prevention of contagious diseases of animals. Then came the Act of 1878 (41 & 42 Vict. c. 74), which is entitled "An Act for making better provision respecting contagious and infectious diseases of cattle and other animals, and for other purposes." I have been able to get the original bill which was introduced into the Legislature, and the heading of this bill is in these words: "An Act for making better provision respecting contagious and infectious diseases of cattle and other animals." So that it was when the bill was passing through Parliament that the words "and for other purposes" were added, and very properly so, if one may say so, seeing that the Act of 1878 did deal with other matters, and was therefore a bill for other purposes than merely for the prevention of contagious diseases in animals. For example, by s. 32 the Privy Council may make orders for preventing or checking of disease, and other purposes. Then s. 33 provides for the provision of water and food at railway stations, and so on. And then s. 34 gives power for the Privy Council to make orders relative to dairies, cowsheds, and milk shops; and again, s. 51 is almost in the same connection. Then we come to s. 53, which deals, as I have already said, with the burial of a carcase washed ashore. It is to be noted that the word is "carcase"—not "diseased carcase," but merely "carcase." "Carcase" is defined by s. 5, sub-s. 6, as meaning "the carcase of any animal, and includes part of a carcase, and the meat, bones, hide, skin, hoofs, horns, offal, or other part of an animal, separately or otherwise, or any portion thereof."

Now one asks oneself this question at once: How could it be possible for the receiver of wreck to say whether a carcase washed ashore was diseased or not, or whether it was infected by some contagion? Therefore it may well be that in this section the word "carcase" is used in the manner in which it is without saying "diseased carcase" or "suspected carcase," or using language of that sort. Then comes the Act of 1886, and by s. 11, as I have pointed out, powers were given which added to the powers given by s. 53 in the Act of 1878; and lastly the consolidating and amending Act of 1894.

It was said by the learned county court judge, and urged strenuously before him, that the Legislature had in its mind the increased traffic in frozen meat, and the importation of live animals. In our opinion it may be, or it may not be, that that was so, but it is not for us to judge whether it was or whether it was not. The Legislature may have had no such exact case as this in its contemplation, but whether it had or whether it had not, if the words of the section are so clear as to create no doubt in the mind of a person applying the ordinary rules of construction of the English language, it matters not whether the Legislature contemplated or whether it did not contemplate such an exact case as this. There is nothing to be observed in the language of the Act as to whether it did or did not.

Now, with regard to the rules of construction, just let me draw attention to one or two cases. In *Grey* v. *Pearson* (1) Lord Wensleydale laid down a rule which has been followed, as he says he was following it, for many years. What he said was this: "I have been long and deeply impressed with the wisdom of the rule—now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall—that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." And in the case of *Ex parte Board of Trade, In re Parker* (1) Brett M.R. said: "My judgment will rest upon a much used and ordinary rule of construction, which is this, that you are to take the words of an Act of Parliament in their plain and ordinary sense unless there is something in the context which obliges you to take them in some other larger or more limited sense."

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(1) (1857) 6 H. L. C. 61, at p. 106.

Now we find here that the language is plain and that the meaning of the words used is plain. Counsel, in arguing for the appellants, first of all said that if the county court judge was right in the construction which he put on this section, then there has been imposed a greater obligation than that which the common law imposed on the owners of ships or vessels or wrecks over which they still exercised control. We know perfectly well—I suppose we may take judicial cognizance of the fact—that in this case, after the *Suevic* was stranded so that she could not be moved, she was cut in half, and one half was left on the main and the other half was taken away and is now a ship. Then the appellants' counsel also contended that that particular section applied only to carcases of animals shipped alive, and not to dead frozen animals when shipped. The Court cannot accept that argument. It seems to us that to do so would be putting too confined a meaning on the word "carcase." Then it was urged that such a case as this refers to a vessel and not to a wreck. But it must be noted that in the statement of defence the defendants, when pleading their defence, called themselves the owners of the steamship *Suevic* at that time, and therefore we think that argument cannot prevail.

Finally we are of opinion that the learned county court judge was right in the judgment which he pronounced in this case. We think that the language of the section is clear and raises no doubt on the matter, and therefore the judgment must be affirmed, and with costs. Whether this was a vessel or whether it was a wreck was a question of fact which was not raised apparently before the Court below. If it was intended to raise it, it should have been raised there, and we are not going to decide that question as a matter of fact now the appeal is dismissed with costs.

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(1) (1885) 15 Q. B. D. 196, at p. 202.

Appeal dismissed.

Solicitors for appellants (defendants), the Oceanic Steam Navigation Company, Limited: *Hill, Dickinson & Co., Liverpool.*

Solicitor for respondents (plaintiffs), the Cornwall County Council: *Christopher L. Cowlard, Bodmin.*

T. L. M.

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June 1.

BOGER *v.* BOGER.

Divorce—Practice—Alleged Adulterer not subject to the Jurisdiction of the Court—Leave to proceed without Service of Citation or Copy Petition—Notice of Proceedings.

A person whose name has been introduced into a divorce petition as an alleged adulterer is entitled to have notice of the proceedings so as to afford him an opportunity of clearing himself from the charge, if he should desire to do so.

The Court, in relieving a petitioner from the necessity of citing an alleged adulterer on the ground that he was a foreigner domiciled and resident out of the jurisdiction, required the petitioner to give him notice of the pending proceedings.

Motion to dispense with co-respondents.

The petition of the husband alleged that his wife had committed adultery "with a man named Hervé" at an address where she was said to be living in France. There was also a general charge of adultery against her with Hervé.

The petition also contained a charge of adultery with men unknown.

The affidavits filed were to the effect that the man Hervé was a French subject domiciled and resident in France, that the alleged adultery with him was committed in France, and that the names of the other alleged adulterers could not be ascertained.

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Le Bas, on behalf of the petitioner, moved for leave to proceed without citing any co-respondent. He referred to *Levy* v. *Levy and De Romance* (1) and *Baker* v. *Baker and Dwyer.* (2)

[BARGRAVE DEANE J. Ought not a man whose name has been put into a petition for divorce to have an opportunity of clearing himself ?].

The late President expressed that view in some case which is unreported. (3)

BARGRAVE DEANE J. I think the petitioner may be relieved from the necessity of serving Hervé, but on the understanding that notice of the pending proceedings is to be given to Hervé, so that he may have an opportunity of clearing himself, should he so desire.

Solicitors for the petitioner: *R. H. Behrend & Roger.*

H. D. G.

[IN THE CHANCERY COURT OF YORK.]

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Jan. 25.

THE OFFICE OF THE JUDGE PROMOTED BY CHESNEY *v.* NEWSHOLME. NEWSHOLME *v.* CHESNEY (2.).

ON APPEAL FROM THE CONSISTORY COURT OF MANCHESTER.

Ecclesiastical Law—Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 4, 9 *—Appeal on Law—Improper Admission of Evidence in Court below—Leave to appeal on Facts—Clergy Discipline Rules*, 1892, *rr.* 68, 69*—Fresh Evidence on Appeal—Discretion.*

Leave to appeal on matters of fact to the Chancery Court of York was granted by the judge of that Court in a case under the Clergy Discipline Act, 1892, where on an appeal on matters of law in the same case it had appeared that material evidence for the prosecutor which ought to have been excluded had been admitted in the Court below.

The 69th rule of the Clergy Discipline Rules, 1892, provides that the appellate Court on any appeal as to the facts under the Act may, if in the opinion of the Court the justice of the case requires it, (*a*) summon any witness heard at the trial to give evidence with respect to the case, and (*b*) order any witness not heard at the trial to give evidence with respect to the case. A defendant who had been adjudged guilty in the Consistory Court of the diocese in which he held preferment of immoral acts within the provisions of the Clergy Discipline Act, 1892, appealed to the Chancery Court of York in respect of matters of law on the ground, inter alia, of the improper admission of evidence in the Court below, and also applied in the same case for leave to appeal on matters of fact. On the appeal on matters of law being heard, the appellate Court was of opinion that certain of the evidence alleged by the appellant to have been improperly admitted ought to have been excluded, and, on the application for leave to appeal on matters of fact coming on, granted leave to appeal on fact on the ground of the improper admission of evidence in the case as above stated, and directed that under the above rule three witnesses who had given evidence in the Court below should be recalled for examination at the hearing of the appeal, and that another witness not heard in the Court below should be summoned to give evidence at the same hearing.

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(1) Ante, p. 256.

(2) Ante, p. 257.

(3) But see *Edwards* v. *Edwards and Wilson*, [1897] P. 316.

THESE were two appeals—one in respect of matters of law and the other in respect of matters of fact—against the judgment of the Consistory Court of Manchester in a suit of the office of the judge promoted by Edward Shuldam Chesney against the Rev. Joseph Wilkinson Newsholme, rector of the parish and parish church of St. Ambrose Pendleton, in the county of Lancashire and diocese of Manchester.

By the judgment appealed against the defendant, the Rev. J. W. Newsholme, had been adjudged guilty of immoral acts within the provisions of the Clergy Discipline Act, 1892, and from the shorthand notes taken on the hearing in the Court below it appeared that the four following witnesses, namely, David Lewtas, Thomas Albert Wilkinson, Eliza Ann Wilkinson, and Arthur Wilkinson, the latter a boy towards whom the defendant was charged to have conducted himself indecently on Monday, November 26, 1906, had given evidence for the prosecutor (a person approved by the bishop of the diocese under the Clergy Discipline Act, 1892), at the hearing in the Consistory Court of Manchester on October 16, 1907, and that the above-mentioned witness Eliza Ann Wilkinson, the mother of the above-mentioned Arthur Wilkinson, had then stated in her evidence that a complaint as to the immoral acts in respect of which the defendant had been adjudged guilty had been made by the above-named Arthur Wilkinson to her on Tuesday, November 27, 1906, twenty-four hours after the occurrence of the immoral acts

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with which the defendant was so charged. It further appeared from the shorthand notes that the defendant and twelve other witnesses had been examined for the defence at the hearing in the Court below.

On October 28 last the defendant gave notice, filed in the registry of the Chancery Court of York on the 30th of the same month, that he petitioned the Chancery Court of York for leave to appeal from the judgment of the Consistory Court of Manchester in the case in respect of the following facts:—That he was guilty of the offences charged against him, and that the facts were such as to support a conviction; on the ground that the judgment of the Court in respect of the facts was not in accordance with the true facts.

On November 6 last the defendant also gave notice that he appealed to the Chancery Court of York from the same judgment in respect of certain matters of law which were stated by him in a notice of appeal filed on November 7 last in the registry of the Chancery Court of York. This notice of appeal and the statements of the matters in respect of which the appeal was originally brought were, however, subsequently (1) amended by the leave of the Court and the consent of the prosecutor. And as so amended the matters of law in respect of which the defendant appealed were stated as follows:—

(*a*) That there was evidence to support a conviction;

(*b*) That the evidence of Arthur Wilkinson, so far as related to his communication to his mother, Eliza Ann Wilkinson, was admissible;

(*c*) That the evidence of Eliza Ann Wilkinson, so far as related to her communication with Arthur Wilkinson, was admissible;

(*d*) That the evidence of Eliza Ann Wilkinson, so far as related to her communication to Thomas Albert Wilkinson, was admissible;

on the ground that the judgment of the Court was wrong in law in respect of these matters; and, further, on the grounds—

(*e*) That there was no corroboration of the testimony of Arthur Wilkinson;

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(1) At the hearing at York on January 8 last.

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(*f*) That the appellant therein was taken by surprise and prejudiced by the fact that on a further charge which was laid against the appellant a verdict of not guilty was entered without evidence being heard thereon, no notice of such intended action on the part of the prosecution being given to the appellant therein.

1908. Jan. 8. The appeal in respect of matters of law was heard at York before the judge of the Chancery Court of York (Sir Lewis Dibdin, D.C.L.), together with the application of the defendant for leave to appeal in respect of the facts of the case.

Marshall-Hall, K.C., *Ernest Charles*, and *Brocklehurst*, for the appellant, defendant in the Court below.

Byrne and *Montague Barlow*, for the respondent.

Cur. adv. vult.

On January 14 last the following judgment was delivered (1) :—

SIR LEWIS DIBDIN. I am not prepared to accede to the views urged before me by counsel for the appellant to their full extent, either as to the alleged improper admission of evidence at the trial or as to the effect of a successful appeal on the alleged grounds of law stated in the notice of appeal being to bring about the virtual acquittal of the defendant; but, having read the shorthand notes of evidence, I think certain evidence was improperly admitted at the trial, and therefore that leave to appeal on fact should be granted. I will on the hearing of that appeal deal so far as may be necessary with the questions which have been already argued and will give one judgment on both appeals.

For the purposes of the appeal on fact I propose, under r. 68 of the Clergy Discipline Rules, 1892, to rehear the case on the shorthand notes of the evidence taken before the learned Chancellor, and under r. 69 of the same rules I require Arthur Wilkinson, David Lewtas, and the defendant to be recalled as witnesses. Under the same rule I direct Margaret Ford, the defendant's housekeeper on November 26, 1906, to be called to give evidence with respect to the case. (1)

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(1) By consent of all parties this judgment was delivered at the Church House, Westminster.

1908. Jan. 24. On this day the appeal on fact was heard before the Judge of the Chancery Court of York. (2)

The shorthand notes of a shorthand writer, by whom the evidence of the witnesses examined at the hearing in the Court below had been taken down, were, in accordance with the direction of the Court, admitted to prove the whole of the evidence then given other than the evidence which the Court in its judgment of January 14 last had ruled to be inadmissible; and under the provisions of r. 69 of the Clergy Discipline Rules, 1892, the four witnesses mentioned in that judgment—namely, David Lewtas, Arthur Wilkinson, and the defendant and Margaret Ford—were also called and gave evidence on the appeal.

Marshall-Hall, K.C., *Ernest Charles*, and *Brocklehurst*, for the appellant.

Byrne and *Montague Barlow*, for the respondent.

Cur. adv. vult.

1908. Jan. 25. SIR LEWIS DIBDIN. This is an appeal from the Consistory Court of Manchester in a prosecution under the Clergy Discipline Act, 1892, the Court consisting of the Chancellor of the diocese and of five assessors. The defendant is the Rev.

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(1) The 68th and 69th rules of the Clergy Discipline Rules, 1892—which under the provisions of the 9th section of the Clergy Discipline Act, 1892, and subject to provisions therein contained as to their having been duly laid before both Houses of Parliament, are whilst unrevoked of the same validity as if enacted in that Act—are in terms as follows:—

"68. If an appeal is allowed in respect of the facts of the case, the case shall, subject to these rules, be reheard by the appellate Court on the note taken by the chancellor or on such other note of the case as may be allowed by the appellate Court."

"69. The appellate Court on any appeal as to the facts may, if in the opinion of the Court the justice of the case requires it,

(*a*) summon any witness heard at the trial to give evidence with respect to the case; and

(*b*) order any new witness not heard at the trial to give evidence with respect to the case."

(2) The Court sat by consent of the parties at the Church House, Westminster.

Joseph Wilkinson Newsholme, rector of St. Ambrose Pendleton. He was charged with indecent conduct towards a boy. He was adjudged guilty by the unanimous decision of the Court. He appealed to this Court on certain grounds of law, and he presented a petition for leave to appeal also in respect of the facts. The grounds alleged for the former appeal were in substance three—namely, (1.) that the learned Chancellor at the trial wrongly admitted evidence of a complaint made by the boy to his mother; (2.) that there was no corroboration of the boy's evidence; (3.) that the prosecutor had prejudiced the defendant by offering no evidence at the trial in support of another charge which was included in the formal complaint which initiated the prosecution. The defendant was of course acquitted on this charge, but it was alleged that the abandonment of the charge on what was termed a technical ground left an inference to be drawn which was injurious to the defendant. I do not think there is anything in this third point. It is extremely unfortunate when charges are introduced into a complaint under the Clergy Discipline Act, 1892, which not only cannot be sustained, but even have to be abandoned at the outset of the trial. I think it is sometimes difficult for a Court quite to resist the effect of an accumulation of charges thus made and not persisted in; but, though that may indicate a defect in the procedure under the Act, it is not the fault of the prosecutor, who, I have no reason to doubt, included the charge in question in the complaint with an honest belief that it was capable of proof.

As to the alleged absence of corroboration, that seems to me in the present case not a matter of law, but one of fact.

As to the question of the admission of evidence of a statement by the boy to his mother, the facts are these: The act complained of is alleged to have occurred between 5 and 6 P.M. on November 26, 1906, in the defendant's study. The boy says that he went straight home, where he arrived before 6 o'clock. His mother asked him why he was late, and noticed that he seemed upset and inclined to cry. She asked him what was the matter. He said he would tell her another time. He said also "Mr. Newsholme is a bad man. Do not let me go to that church any more." The next day the boy went to school all day, but in the evening, being, as he says, "pressed" by his mother, he made a full statement to her of the alleged indecent acts of the defendant. The learned Chancellor admitted the evidence of the boy and his mother relating to both these statements. I think, upon the well-known principle adopted in the ordinary Criminal Courts, laid down and explained in *Reg.* v. *Lillyman* (1) and *Rex* v. *Osborne* (2), that the evidence as to the first statement would be admissible as supporting the consistency of the boy's story, but that the evidence as to the fuller statement made twenty-four hours later, after the boy had been mixing all day with his school-fellows, would not be admissible. The rules of evidence of the Ecclesiastical Courts have, with certain exceptions immaterial to the present case, always been the same as those of the Civil Courts: see Dr. Lushington in *Conway* v. *Beazley.* (3) I think, therefore, the evidence relating to the statement of the boy to his mother on Tuesday, November 27, ought to have been excluded, and that to that extent the appeal on law must succeed. It was argued that, on the analogy of a criminal prosecution in the temporal Courts where evidence has been wrongly admitted and the conviction is consequently quashed, I ought to reverse the decision of the Consistory Court and acquit the defendant. But I do not think that is the right view. The result of a verdict arrived at on evidence partly good and partly bad was and is (apart from civil cases affected by Order XXXIX., r. 6, of the Rules of the Supreme Court) that the verdict is vitiated. In civil cases a new trial is directed. In criminal cases tried by a jury, there being no power to direct a new trial and (apart from the recent Act (4)) no right of appeal, the prosecution falls to the ground. But in ecclesiastical suits, whether under the Church Discipline Act, 1840, or the Clergy Discipline Act, 1892, there is no jury, and appeals are provided for, which are rehearings of the case on fact as well as on law, although under the latter Act appeals on fact are subject to leave having been obtained. It seems to me, therefore, that the effect of the admission of improper evidence at the trial in such cases

(1) [1896] 2 Q. B. 167.

(2) [1905] 1 K. B. 551.

(3) (1831) 3 Hagg. Eccl. 639, at p. 651.

(4) The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23).

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v.
CHESNEY (2.).

Sir Lewis Dibdin.

as the present is that if leave to appeal is asked it ought to be granted, in order that there may be a rehearing on proper materials of fact, excluding those which, though wrongly admitted at the first hearing, may yet have influenced the result. I accordingly acceded to the petition of the defendant for leave to appeal on fact, and the case has been reheard before me in accordance with rr. 68 and 69 of the Clergy Discipline Rules, 1892, on the transcript of shorthand notes of the evidence taken at the trial. I have recalled three witnesses examined at the trial. I have also required the attendance of one new witness.

The Court then proceeded to discuss the evidence and in the result affirmed the decision of the Court below.

Solicitors for appellant: *Crowder, Vizard, Oldham & Co.*
Solicitors for respondent: *Cobbett, Wheeler & Cobbett.*

C. F. J.

1908
May 20, 21, 22, 26.

JACKSON (OTHERWISE MACFARLANE) v. JACKSON.

Nullity of Marriage—Unsoundness of Mind—Delusional Insanity—Paranoia—Delusions of Suspicion—Decree—Custody of Child—Costs of the Official Solicitor as Guardian ad litem of the Respondent—Form of Order.

Upon a petition for nullity of marriage on the ground of insanity, the question which the Court has to determine is not whether the respondent was aware that he was going through the ceremony of marriage, but whether he was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject.

The Court has to look at the nature of the alleged unsoundness of mind to see whether it is of a character which might come on suddenly, or whether it is a matter of progressive growth and development, and to ascertain whether the respondent's insanity can be traced back to an early period to such an extent as will justify the Court in coming to a conclusion that it existed before as well as after the marriage contract was entered into.

In pronouncing a decree of nullity the Court ordered that the child of the union should be given to the petitioner.

The costs of the official solicitor, as the guardian ad litem of the respondent, a person of unsound mind not so found by inquisition, were ordered to be paid by the petitioner, who was given leave to add the same to her own costs of suit, as against the respondent.

THIS was a wife's petition for nullity of marriage on the ground that the respondent was of unsound mind at the date of the ceremony of marriage.

The date of the marriage was October 8, 1904, and a child was born on October 20, 1905.

In March, 1905, the respondent was certified as a person of unsound mind, and he had since that time remained under restraint.

He was represented in the suit by the official solicitor as his guardian ad litem.

The general facts of the case call for no detailed report.

Barnard, K.C., and *Willock*, for the petitioner.

Rawlinson, K.C., and *W. O. Willis*, for the respondent.

Cur. adv. vult.

May 26. BARGRAVE DEANE J. In this case Catherine Roxburgh Jackson, whose maiden name was Macfarlane, asks for a decree of nullity of marriage upon the alleged ground that at the time of the marriage with the respondent, Herbert Parry Malpas Jackson, he was not of sound mind and capable of entering into the marriage contract.

The respondent, unfortunately, owing to his present state of health, is unable to be present. I understand that the medical gentlemen attending him say that it would be prejudicial to him and would unduly excite him to come here. It is an undoubted fact that he is certified as insane and is in confinement. I am therefore deprived of his assistance, except that a letter written by him to the official solicitor since the case was opened and reported in the newspapers has been read in Court by consent of the counsel for the petitioner.

The first question I have to ask myself is, What is the law with regard to these questions of nullity of marriage, when the allegation is, as here, that one of the parties was from unsoundness of mind incapable of contracting?

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JACKSON v. JACKSON.

Bargrave Deane J.

There is one substratum running through all the cases which indicates that one has to look at the nature of the alleged unsoundness of mind to see whether it is of a character which might come on suddenly, or whether it is a matter of progressive growth and development.

Apparently, in the older reported cases, the Court has hardly ever granted a decree where the evidence of the medical witnesses has proved or suggested that the particular form of insanity might be of sudden occurrence.

The cases where the Court has found incapacity to contract are where the unsoundness of mind has been of progressive growth.

In the present case, therefore, it seems to me that I must ascertain and determine whether the respondent's insanity can be traced back to an early period to an extent which substantially will justify me in coming to a conclusion that it existed before as well as after the marriage contract was entered into.

I propose, before considering the evidence, to call attention to the language of the President (Sir James Hannen) in *Hunter* v. *Edney* (*otherwise Hunter*) (1), as follows: "The question which I have to determine is not whether she" (the respondent) "was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions on the subject." Those words are short, concise, and clear, and I think I may fairly use them in applying my mind to the particular facts of the present case.

The respondent, when he entered into this marriage, was thirty-six years of age. He was by profession an artist, and he had, according to those who knew him in earlier life, always been of a retiring, silent, somewhat morbid disposition.

[The learned judge then proceeded to analyse and comment on the evidence in detail.]

This form of insanity is now termed paranoia. Originally it was known, we are told, as delusional insanity. The medical experts say that it is incurable in a case where it is shewn to be, as in the present unfortunate instance, of progressive growth and development. Dr. Savage tells us that it comes sometimes from sudden illness. It may be inherent in the individual, and it is often found appearing in the case of persons who, when younger, were of a silent and morbid disposition.

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(1) (1881) 10 P. D. 93, at p. 95.

I have come to the conclusion that the facts of this case bring it within the language I quoted at the outset. The petitioner had to satisfy me that at the time of the marriage the respondent was subject to morbid delusions. I am of opinion that she has succeeded. I therefore pronounce a decree nisi, with costs, and I make the order asked for that the petitioner have the custody of the child.

On the application of counsel for the respondent, an order was made, following the form of order made by Neville J. in an unreported case in the Chancery Division (*Goatley* v. *Jones*, June 21, 1907), that the costs of the respondent of the petition, including therein the costs of the official solicitor incurred in the performance of the duties of the office of guardian ad litem to the said respondent, be taxed, and when taxed be paid by the petitioner to the official solicitor as such guardian ad litem, and that the petitioner be at liberty to add what she should so pay for the costs of the said respondent to the costs of the petitioner of the suit.

Solicitors for petitioner: *Young, Son & Ward.*
Solicitor for respondent: *The Official Solicitor.*

H. D. G.

1907
Nov. 20, 21,
22, 23, 25, 26;
Dec. 18.

THE BRUXELLESVILLE.

Admiralty—Collision—Subsequent Total Loss—Proximate Cause—Temporary Repairs—Consequential Damage—Remoteness.

The plaintiffs' steamship was so badly damaged in a collision in the English Channel with the defendants' vessel that she had to put into Portland, where she was temporarily repaired, and she then proceeded to complete her voyage to Bristol in order to deliver her cargo and earn the freight; but she sank off the Lizard. In an action of damage by collision the plaintiffs claimed to recover as for a total loss:—

Held, that though the collision was due to the negligence of those in charge of the defendants' vessel, and therefore her owners were liable for the damage sustained by the plaintiffs' steamship, they were not liable for her subsequent loss, as that was not the natural and reasonable result of the wrongful act of the defendants' servants, but was due to the insufficient measures taken by the plaintiffs to repair their vessel in the port of refuge, by reason of which she could not be safely navigated to her port of discharge.

ACTION of damage by collision. The plaintiffs were the owners of the *Veritas*. The defendants were the owners of the *Bruxellesville* and her freight.

The case is reported on the question of remoteness of damage.

On July 22, 1907, about 4 A.M., a collision occurred in the English Channel, some fifteen miles to the southward of Portland Bill, between the Norwegian steamship *Veritas*, of 1133 tons gross register and fifteen hands, from Gothenburg to Bristol with a cargo of wood, wood pulp, paper, and general goods, and the steamship *Bruxellesville*, of 4075 tons gross register and eighty-two hands, from the Congo to Southampton and Antwerp with cargo and passengers.

As a result of the collision the *Veritas* sustained so much damage that her forehold filled with water, obliging her to put into Portland, where she was temporarily repaired. She then proceeded on her voyage to Bristol for the purpose of delivering her cargo and earning the freight; but when off the Lizard she made so much water that she was obliged to anchor, and, the pumps not keeping the water under, she sank before assistance could be obtained.

The case was heard on November 20 and 21, 1907, by Bucknill J., assisted by two of the Elder Brethren of the Trinity House, and the learned judge having found that the *Bruxellesville* was alone to blame for the collision, the question whether the owners of that vessel were liable for the subsequent loss of the *Veritas* was then tried, and the hearing continued on November 22, 23, 25, and 26, the contention of the plaintiffs being that the defendants were responsible, as the temporary repairs were approved by the surveyors of the underwriters and of the defendants, but that further damage which had been undiscoverable by the surveyors at Portland led to the vessel's sinking; whilst the defendants contended that the plaintiffs did not take any, or any sufficient, measures to repair the *Veritas* or to prevent her sinking, and, therefore, the loss was too remote to be attributable to the defendants.

Laing, K.C., and *Adair Roche*, for the plaintiffs, the owners of the *Veritas.*

Aspinall, K.C., *J. A. Hamilton, K.C.*, and *Alex. D. Bateson*, for the defendants, the owners of the *Bruxellesville* and her freight.

The arguments of counsel fully appear from the judgment, in which also the nature of the repairs effected and the causes of their failure to enable the vessel to reach her port of discharge are set out in detail. The following cases were referred to:—By counsel for the plaintiffs, as to the loss being the natural and reasonable consequence of the collision—*The Flying Fish* (1); *The City of Lincoln* (2); *Reischer* v. *Borwick*. (3) By counsel for the defendants, on the question of remoteness of damage—*The Argentino* (4); *The Kate* (5); *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (6)

Cur. adv. vult.

1907. Dec. 18. BUCKNILL J. The question I have to decide is whether the defendants, the owners of the *Bruxellesville*, are responsible for the foundering of the *Veritas* on August 5 of this year.

(1) (1865) Br. & L. 436, at p. 443.
(2) (1889) 15 P. D. 15.
(3) [1894] 2 Q. B. 548.
(4) (1889) 14 App. Cas. 519.
(5) [1899] P. 165, at p. 168.
(6) [1901] A. C. 362.

The collision between these two ships took place on July 22, about fifteen miles south of Portland Bill. The *Bruxellesville* struck the *Veritas* on the starboard bow, with her stem, which penetrated up to and even past the middle line of the deck, making a hole which was not less than seventeen feet wide, and which went down almost to the turn of the bilge, a tremendously big wound, and the ship being timber laden in the forehold, the displacement of the cargo by the penetrating ship was such that it bulged the engine-room bulkhead.

The *Veritas* got to Portland in safety, and it is to be noted that it is said in the log that she got there going full speed ahead. She was very much down by the head, and in that condition she was put alongside one of the coal hulks in Portland Harbour, where she remained for some little time, until visited first of all by Mr. Camps, and secondly by two gentlemen to whom I will refer presently. Portland Harbour was, therefore, for the time being the port of refuge for this ship. She was bound to Bristol, and the question on behalf of all concerned was: What was to be done with her? Should she be temporarily repaired at Weymouth, or taken to Southampton or some other place to be repaired? Mr. Camps, a gentleman of considerable ability and ingenuity, and who gave extreme attention to the matter, thought he could repair the vessel at Weymouth sufficiently for her to go to Bristol, provided that she was carefully and cautiously navigated, and that she put into port if the weather was bad. He devised a scheme for the temporary repair of this ship. A wooden shield, consisting of planking, of sufficient thickness and backed up with all necessary struts and backings, was considered by him to be sufficient to stiffen the ship. Then Mr. Camps devised two longitudinal steel girders, one about the line of the deck and one below it, and those steel girders, it was thought, would make the ship additionally stiff. As to the steel girders and the shield, I have nothing to say against the workmanship, but I doubt whether it was wise to put any part of the strutting or backing of this shield against the timber cargo. I do not say that that was wrong, but that is the opinion I have formed. During the repairs the *Veritas* was partly aground, having been placed on the beach under the advice of the ship surveyors, and with the consent of Mr. Camps, who was the chief man in this matter. She was aground forward, but afloat aft for some portion of her length. A point was made—and one which seemed to me to be a good point—that, however well you might do those repairs, as soon as you floated the ship—and this ship was floated with considerable difficulty, because it took two tugs to get her off the ground when repaired—there would be set up at once strains which would not be the same as the strains which would exist when she was repaired ashore.

When temporarily repaired in the way I have described, the *Veritas* was floated and pumped out, when it was found that she had a strong list to port. To rectify that, thirty tons of bunker coal were put on the starboard side, and the ship became practically upright, and certain certificates of seaworthiness were given. Mr. Camps stated that in his opinion the ship was seaworthy to continue her voyage. The certificate given by Mr. Ayles and Captain Brander stated that: "Referring to our survey report of the 22nd July last, we again this 2nd day of August, at the request of Richard Cox, Esq., J.P., Vice-Consul for Norway, and the master, Mr. Tollefsen, of the said steamship *Veritas*, did proceed to Portland Roads and around, alongside, and on board the said steamship, and found that the water had been pumped out of the forehold, that overall patches or shields had been bolted on over the broken and damaged plates, the deck securely strapped with iron stringers or plates, and the vessel made temporarily secured and practically tight. We found that a six-inch centrifugal pump had been placed on board and efficiently connected with the vessel's engine, and we now, after conferring with the divers and others employed in effecting such temporary repairs, consider the said steamship may safely proceed under easy steam to Bristol, her port of destination, where we recommend after her cargo is discharged she should be placed in dry dock and a further and more complete survey on the damage sustained by her be held." On the strength of Mr. Camps' opinion, and of that survey report, the vessel left Portland on August 4. Before she left, a centrifugal pump had

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been put on board having, it was said, a pumping power of 150 tons an hour. On the one hand it was said it was sufficient for all purposes, but one gentleman who gave evidence for the defendants said he thought it was not sufficient, and that a second ought to have been shipped as well. With that pump, and repaired as she was, and with a Bristol pilot on board, she left Portland in fine weather on August 4. When the ship left Portland, she was practically a tight ship, and the weather was fine. Let us see what happened to her on her voyage. She had only got nine miles when two feet of water was found to be in her hold. There was only a fresh breeze then, and the weather was hazy. Now it is to be noted that some of the witnesses said that in their opinion the repairs as done would have been sufficient if the vessel had been going to navigate perfectly smooth water—river water, or the sea where there was no swell. Of course with a fresh breeze there would be more or less a swell, and, apparently, almost as soon as that swell came on two feet of water was found in the forehold. I am now reading from the log, and I take it that it gives a true history of what took place. The weather was hazy, and the wind continued fresh up to noon. Towards 4 o'clock there was a light breeze, and it was found necessary to put the steam pump to work. From 4 to 8 P.M. the log indicates that there was five feet of water in the hold, and that the pump was still pumping, although there was only a slight swell. At 11.15 the Lizard bore north by west about six miles off, and the wooden patch on the outside was found to be beginning to yield, and the leakage was becoming greater and greater. The master was called, and it was then decided to proceed in to an anchorage and try to get the pump to pump better, as it was not acting satisfactorily. Upon this question of the pump I have to make this observation. I turn to the engine-room log and I find this: "Monday, August 5.—At 11.30 P.M. the engines were ordered half speed. At 11.45 P.M. the chief engineer was called, and we anchored at about 12.15 o'clock. We both commenced to work at the pump on the fore-deck." We have not been told what that work was, because certainly the flange had not broken then. The evidence is that the paper pulp in the forehold had choked the rose of the pump, and that it had to be hoisted on several occasions to be cleared, but that did not take long to do, only a few minutes, and I suspect, from this entry in the engineer's log, that there was something else wrong about that time. Anyhow, whatever they were doing, the engineer's log proceeds: "During the work on the pump a flange of the steam-pipe broke. We at once proceeded to pack it; but the leak became greater and greater and finally the ship heeled over to such an extent that the water streamed in at the upper edge of the patch." Then the ship's log proceeds: "At 12.15 A.M. anchored with the port anchor about two miles off Cadgwith and one mile from the shore. We immediately got to work in order to get the pump to act. During that work a flange of the steam-pipe broke," &c.

It is said that the vessel eventually foundered simply because the pump did not act, or because there was this unforeseen accident to the flange, which delayed the pump's working. Of course, if it was only the unforeseen breaking down of the pump, and if the pump would have continued to pump all the water out as fast as it came into the forehold, that would be one condition of things; but I have to ask myself whether this vessel was repaired reasonably fit to proceed upon her voyage. If she was not, that is, if she was sent to sea when she was not equal to any strain that might be put by a rough sea upon this shield, causing it to work or bend and so to make a leak, I do not think that that vessel was reasonably fit to face the sea. She had to get round Land's End, and then to get as far as Bristol, and between Land's End and Bristol there is a long piece of coast where there are few ports into which she could put; and I find as a fact that this vessel was not fit to take the sea. The reasons which I have to give for that finding are the reasons which have been given by the witnesses called on the part of the *Bruxellesville*. Several witnesses have been called on behalf of the plaintiffs—Mr. Steele and Mr. Lewis, extremely able men, Mr. Camps, also an extremely able man, and others—all of whom gave evidence to the effect that the vessel was fit to proceed upon that voyage. On the other side was the evidence given by Mr. Robertson, who had a very considerable amount of practical knowledge upon matters of this description.

I do not rely so much upon the fact that he spoke of another ship which he had temporarily repaired in somewhat similar circumstances, because each particular case must be decided upon its own particular facts. The Elder Brethren and I have very carefully considered all the evidence, and I prefer to accept, upon their advice and on my own judgment, the opinion of Mr. Robertson, who stated that in this particular case the wood shield should have been of a much smaller area and the longitudinal steel girders of a much larger area for the stiffening of the ship than were those which Mr. Camps advised and which he put in the position I have indicated. Counsel very naturally put to Mr. Robertson, "Is it not easy to be wise after the event?" and to that extent the Court considers the evidence of witnesses who, judging partly perhaps by what has happened, come to the conclusion that sufficient was not done. I think that wooden shield was of too large an area, with the result that almost immediately after she started, and directly she got clear of the Bill of Portland, when there was a fresh breeze and some swell, two feet of water was found in her hold. There is a suggestion that it was the drainage from the cargo. I reject that suggestion. She had been long enough at Portland during the time the repairs were going on to make it inconceivable that there should have been still such a drainage from the cargo as to have caused two feet of water to be found in the hold immediately after she started. No. The water which got into the hold got in from outside, and because the girders or shield or both had begun to work and she very soon began to shew that sign of weakness which finally led to her loss. Mr. Bushell corroborated Mr. Robertson, except that he would not have it that the centrifugal pump was sufficiently powerful. I do not quite accept that, because I think, if nothing else had happened, it is possible that with the ordinary leakage which might have been expected after the ship got into the seaway, this pump, which was quite capable of pumping 100 tons an hour, would have been able to cope. The evidence of the master of the *Veritas* is very important. I think he was an extremely courageous and honest man, but I am inclined to think that his courage stood in his own way. It was a matter of great importance for him that he should be successful in this trip, and he was, of course, extremely anxious to shew his owners that he could take the ship to her destination. But he could and ought to have put into Plymouth or Falmouth, and if he had, the very first person who would have been called in would have been Mr. Camps, and Mr. Camps would have seen where the weakness was and what could be done. The master, however, did not do that. He proceeded on until he found that he could proceed no longer. He then took her to an anchorage. Tugs were fetched, and finally the ship went down head first.

The conclusion which I draw from the facts that I have found is that the repairs were altogether insufficient for such a voyage. I find that the shield began to work and to leak almost immediately after the ship left Portland. That is the most important fact in the case. I find also that the big hole in the deck was not repaired at Portland, and that was a danger which ought not to have been existent at the time the ship left Portland. Something ought to have been done to prevent water which got on the deck from getting into the ship, and nothing was done, and I find that contributed to the disaster which happened afterwards. There was evidence given on behalf of the *Bruxellesville* that with this pump there should have been sent an experienced engineer—a man who would have been able to devote his time to that salvage engine instead of having to call the engineer of the ship when the pump was found to be working unsatisfactorily. I think that ought to have been done. What happened was this. The flange of the pump broke or gave out at a certain time, and having given out, the steam escaped, and until the flange was repaired the pump could be no longer worked. The giving out was an accident for which nobody was responsible, but it took two hours to mend, and it is probable that if a special engineer had been sent to keep an eye on it something might have been done at an earlier stage than was done.

These being the facts of this case, the conclusion to which I have come is that the foundering of the *Veritas* is not a matter for which the wrong-doing ship can be made liable. "The first, and in fact the only, inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume this character if it can be shewn to be such a consequence as, in the ordinary course of things, would flow from the act." (1) It is clear on the facts that the foundering of the ship was not the natural and reasonable result of the defendants' act. That being so, the judgment which I have already pronounced follows, and there must be the usual reference to the registrar. The plaintiffs will have the costs of the action, but the defendants will have the costs of the issue decided in their favour.

Solicitors for plaintiffs, the owners of the *Veritas*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Bruxellesville* and her freight: *Lawrence Jones & Co., for Batesons, Warr & Wimshurst, Liverpool.*

T. L. M.

1908
June 3, 4, 19, 20.

THE ST. PAUL.

Admiralty—Collision—In or approaching Falling Snow—Sound Signals—Speed—Regulations for Preventing Collisions at Sea, 1897, *arts.* 15, 16.

By arts. 15 and 16 of the Regulations for Preventing Collisions at Sea, a steam vessel, having way upon her, must, in falling snow, go at a moderate speed, and she must also sound, on her whistle or siren, at intervals of not more than two minutes, a prolonged blast; but these regulations do not in terms apply to a vessel approaching falling snow, and, therefore, those in charge must, in such a case, be guided by considerations of good seamanship with a view to ensure that their vessel shall be going at a moderate speed when she is herself enveloped in falling snow, and similar considerations will indicate to them the necessity, as in the analogous case of fog, of giving warning of the presence of their vessel by sounding the signal whilst in the vicinity of falling snow.

Semble, that if the vessel is, at the time she is approaching falling snow, in charge of a pilot by compulsion of law, the sounding of the signal will be a matter within his province.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the Commissioners for executing the Office of Lord High Admiral of the United Kingdom and the officers and crew of H.M.S. *Gladiator* (suing for their lost effects). The defendants were the International Mercantile Marine Company of New Jersey, the owners of the steamship *St. Paul*. (1)

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(1) Mayne on Damages, 7th ed. (1903) p. 49.

The case is reported on the question of good seamanship with reference to sound signals and speed in the case of a steam vessel approaching falling snow, but not in strictness within arts. 15 and 16 of the Regulations for Preventing Collisions at Sea, 1897. The terms of these articles are set out in the judgment.

On April 25, 1908, about 2.28 P.M., H.M.S. *Gladiator*—a second class protected cruiser of 5750 tons displacement, 320 feet in length, and 57 feet beam, fitted with vertical triple expansion engines of 10,000 indicated horse power and twin screws, and manned by a crew of about 250 hands all told—was in the Solent channel, between Hurst Castle and Victoria Fort, on a voyage from Portland to Spithead, and, according to the evidence of the plaintiffs, the wind at the time was north-north-westerly, and it was snowing heavily. The tide was flood, setting to the eastward with a force of about two to two-and-a-half knots. The cruiser was heading N. 77° E. (about E. b. N.) magnetic, making about nine knots through the water, and was keeping to the southern side of the fairway. She was duly sounding on her siren, at proper intervals, the regulation signal for a steam vessel under way in falling snow. In these circumstances those on board the cruiser saw, at a distance of about half a mile, bearing ahead, and a little on the port bow, a vessel which proved to be the twin screw steamship *St. Paul*, of 11,629 tons gross and 5874 tons net register, 554 feet in length, from Southampton to New York, via Cherbourg, with 168 passengers, mails, a general cargo, and manned by a crew of about 362 hands. According to the plaintiffs, as the *St. Paul* came into sight she was heard to sound two short blasts, and was seen to be acting under a starboard helm, as if intending to pass

(1) There was no counter-claim to this action; but in a cross action, not consolidated, tried at the same time, the plaintiffs were the owners of the *St. Paul*, and the defendants were Walter Lumsden, captain of H.M.S. *Gladiator*, and Sydney Beckwith Mainguy, lieutenant R.N., navigating officer of H.M.S. *Gladiator*. For the reasons given in the judgment the case was, however, by consent, dealt with as between ship and ship.

starboard side to starboard side. The helm of H.M.S. *Gladiator* was accordingly at once starboarded thirty degrees; but the *St. Paul* coming on at great speed, heading for the cruiser, and closing in as if under port helm, caused great risk of collision, and, as the sole chance of escape, the helm of the cruiser was put hard-a-port to throw her quarter clear. The *St. Paul,* however, with her stem struck the starboard side of the cruiser about amidships, doing her great damage, and causing her to sink shortly afterwards, with consequent loss of life. The plaintiffs charged those on board the *St. Paul* with (inter alia) failing duly to sound the appropriate signal whilst under way in falling snow, with excessive speed, with failing to pass on the port side of the cruiser, with improperly starboarding, and then, before she had altered her course sufficiently to clear, improperly porting, and failing to indicate that course by the appropriate signal, and with failing to keep to that side of the fairway which lay on her starboard side.

According to the defence the *St. Paul,* in charge of a duly licensed Trinity House pilot, was proceeding down the Solent on her starboard side of the channel on a course of W. ½ S. magnetic, and, with engines working at half speed, was making from nine to ten knots, the weather at the time being overcast with passing snow squalls, the wind N.N.W., a strong breeze to a moderate gale, with squalls. In these circumstances, according to the evidence of the defendants, the cruiser was seen about half a mile distant and bearing about half a point on the port bow. Both engines of the *St. Paul* were at once stopped. Almost immediately afterwards, when the cruiser had sounded a short blast and was shewing her port side, the helm of the *St. Paul* was put hard-a-port, one short blast was blown, and the starboard engine was put full speed astern. The vessels were then in a position to pass safely port side to port side, but the cruiser starboarded, and, although the port engine of the *St. Paul* was also put full speed astern, the cruiser came on at high speed across the bows of the *St. Paul,* and the collision occurred, causing considerable damage to the liner. The defendants charged those on board the cruiser with (inter alia) failing to pass the *St. Paul* port side to port side, with improperly starboarding, with not indicating by sound signals that she was directing her course to port, with excessive speed, and with not navigating on that side of the fairway which lay on her starboard side. Alternatively the defendants set up the plea of compulsory pilotage; but, as pointed out in the judgment, the discussion of this question became unnecessary. The evidence, subsequently admitted, as to the nature of the sound signals given by the *St. Paul* is sufficiently indicated in the judgment.

The Attorney-General (*Sir W. S. Robson, K.C.*), *Lauriston Batten, K.C.*, *W. Wills*, and *J. G. Pease*, for the plaintiffs, the Commissioners for executing the Office of Lord High Admiral. It must be admitted that the accounts given by the witnesses from His Majesty's ship and from the *St. Paul* are, on some material points, in sharp conflict; but it seems clear that, even assuming the *St. Paul* may not have starboarded for the cruiser, she did in fact starboard in order to bring herself on to the course it was necessary for her to follow down the channel, and, therefore, there is no reason to doubt that the look-out on board H.M.S. *Gladiator* saw the *St. Paul* altering to port, and reported two short blasts. The officer in charge was, therefore, justified, on the report he received, in giving the order he did, and it follows that the cruiser was not to blame for starboarding, as she thereby endeavoured to comply with the movements and sound signals of the *St. Paul*. On the other hand, the *St. Paul* must be found to blame for excessive speed, and for not sounding her whistle for falling snow, whether she was at the material time actually in falling snow or only approaching the snow flurries, for a main object of arts. 15 and 16 of the Regulations for Preventing Collisions at Sea is not only to compel warning to be given to other vessels which may be obscured by falling snow, but also indirectly to oblige a vessel approaching snow to so reduce her speed that when she herself enters the snow she may be proceeding at a moderate speed: see *The Bernard Hall* (1), following *The N. Strong*. (2)

In addition to improperly starboarding, the *St. Paul* was improperly navigating on the wrong side of the channel in

(1) (1902) 71 L. J. (Adm.) 72.

(2) [1892] P. 105.

breach of art. 25, and her look-out must have been defective, as those in charge did not hear any of the signals which were undoubtedly given by the cruiser.

The defence of compulsory pilotage also fails, because the *St. Paul* came within certain exemptions created by Orders in Council.

[THE PRESIDENT. The question whether the pilot was employed by compulsion of law need not be argued now, as it may not arise.]

Assuming that pilotage was compulsory, that will not exonerate the owners of the ship in respect of the absence of sound signals, for it is within the province of the master, and not of the pilot, to decide whether to sound the signals required by art. 15, just as it is the duty of the master to decide what lights ought to be exhibited : *The Ripon.* (1)

[THE PRESIDENT. The appropriate article prescribes the exhibition of certain lights between sunset and sunrise, and leaves no discretion to the person in charge of the ship; but art. 15 only requires the signal to be sounded in, amongst other cases, falling snow, and this is a matter on which discretion has to be exercised, because the application of the rule depends on the actual state of the weather. Is not the pilot the person to exercise this discretion, and to decide whether the conditions are such as to require the sounding of the signal ?]

No; the duties of the pilot are confined to navigating the ship, that is, directing her course; it is the duty of the master to comply with rules made for the purpose of warning other vessels of the presence of his vessel, as in the case of lights and fog signals.

The master ought also to have drawn the attention of the pilot to the excessive speed of the *St. Paul*, and not have allowed him to navigate the vessel at a speed which was a breach of art. 16, and an obvious danger: see *The Girolamo* (2), discussed in *The Lochlibo* (3) ; see also *Oakley* v. *Speedy*. (4) In *The Tactician* (5) it was held that the pilot in charge of a ship is entitled to the active assistance of the master in pressing upon his attention

(1) (1885) 10 P. D. 65.
(2) (1834) 3 Hagg. 169.
(3) (1850) 3 W. Rob. 310, at p. 320.
(4) (1879) 4 Asp. M. L. C. 134.
(5) [1907] P. 244.

such matters as this, involving possible risk: see also *Moss* v. *The African Steamship Co., The Calabar.* (1) As against the Crown the *St. Paul* cannot rely on the protection given to owners and masters in respect of the employment of compulsory pilots by s. 633 of the Merchant Shipping Act, 1894. The owners can only depend on the common law doctrine that a pilot employed by compulsion of law is not their servant. Whether the relationship of master and servant existed depends on whether the master had in fact power to control the pilot. It is obvious that the master did not in fact surrender the control of the vessel to the pilot, though he acquiesced in the orders given by the pilot, for the master admitted that he would have himself sounded the whistle, had he considered it necessary, notwithstanding the presence of the pilot.

Aspinall, K.C., Laing, K.C., and *C. Robertson Dunlop*, for the defendants, the owners of the *St. Paul.* It is submitted that the sole cause of this collision was the improper starboarding of the cruiser at a time when the vessels were approaching each other in such a position that they would have passed safely port to port. For this wrongful action of the helm the *Gladiator* must be found to blame. Her speed also was excessive, for she was sounding her siren for falling snow and yet proceeding at nine knots. The charges brought forward by the plaintiffs, with a view to render the *St. Paul* partly to blame, are not borne out by the evidence, for the directions as to whistling and as to speed contained in arts. 15 and 16 of the Regulations for Preventing Collisions at Sea do not apply to this case, as they only relate to a vessel which is herself in falling snow, and not to a vessel approaching snow flurries: see, in the analogous case of fog, *The Oravia.* (2) Whether the *St. Paul* should in the circumstances have sounded her whistle and still further reduced her speed are questions, not of the regulations, but of seamanship, and will be decided in favour of the *St. Paul*, as that vessel was not, at the material time, herself in falling snow, and those in charge saw the *Gladiator* at a distance of half a mile. The decision also on both these points rested with the pilot who was

(1) (1868) L. R. 2 P. C. 238.

(2) (1905) 10 Asp. M. L. C. 100, and (1907) 434.

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compulsorily in charge, pilotage being compulsory in the waters of the Solent: *The Assaye.* (1) Even if the navigation of the *St. Paul* was in any of these respects faulty, those on board H.M.S. *Gladiator* could, by the exercise of reasonable care and skill, have avoided the collision, and, therefore, on the common law principles applicable to this case, the cruiser is alone to blame. The allegation that the *St. Paul* was on her wrong side of the channel cannot be substantiated, because the evidence of the cruiser is that she (the cruiser) was in about mid-channel, and, by the admitted starboarding, she would be brought on to the *St. Paul's* side of the channel, where in fact the *St. Paul* was.

1908. June 20. SIR GORELL BARNES, PRESIDENT. This is a case which was heard before me on the 3rd and 4th of this month, and some further evidence was taken yesterday. Judgment was suspended at the request of the parties—and that has enabled the further evidence to be taken—because a court-martial was pending, and it was desired that the case, so far as this Court was concerned, should stand over until after the court-martial had been disposed of. I understand, from communications by counsel, that it has been arranged that I should give my judgment, at present, in the case of the Commissioners for executing the office of Lord High Admiral of the United Kingdom and the officers and crew of H.M.S. *Gladiator* against the owners of the steamship *St. Paul*; that is to say, that my judgment should be given as between ship and ship for the present, and that if it becomes necessary at any time to give a judgment in the other action, which is by the owners of the *St. Paul* against Captain Lumsden and Mr. Mainguy, navigating officer of the *Gladiator*, that it should be dealt with at a later time, the reason for this being, as I understand, that it enables me to deal with this action by the *Gladiator* against the *St. Paul* as between ship and ship, and to leave out of consideration for the moment any question of the individual action of persons on board the *Gladiator*. So I propose to deal with the case only as a case in the ordinary way between shipowners on the one side and shipowners on the other. The two actions, however, were tried together.

(1) [1905] P. 289.

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The case arises out of a very disastrous collision between H.M.S. *Gladiator* and the American liner *St. Paul* which took place on April 25 last, a minute or two before 2.30 P.M., in the Solent, off Fort Victoria, speaking generally. The result was that the *Gladiator*, while attempts were being made to get her safely on the beach, sank at a spot shewn on the chart, where the wreck is marked, and one is very sorry to know of the great loss of life which occurred, although every care was taken to prevent it. The *St. Paul*, on the other hand, was damaged about the bows in the manner which is shewn on the photographs which were put in.

This collision, as I have said, was a very disastrous one, and—I am using a term or expression which I think fell from the Attorney-General when addressing me in this case—he said, "there must have been a bad mistake somewhere." I have to endeavour to solve the problem of what that mistake was, and to deal with all the different points which have been made in the case. There is not much conflict on the evidence with regard to the general features of the case, but there are certain contested points which require very careful consideration, and upon which very much depends in the case. As I have said before, I am leaving out of consideration at present any question attaching to individuals.

The *Gladiator* was a second class protected cruiser of 5750 tons displacement, 320 feet in length, and 57 feet beam, fitted with vertical triple expansion engines of 10,000 indicated horse power and twin screws, manned by a crew of about 250 hands all told, under the command of Captain Walter Lumsden, and was on a voyage from Portland to Spithead. The navigating officer at the time was Lieutenant Mainguy. The *St. Paul*, a twin screw steamship of 11,629 tons gross and 5874 tons net register, 554 feet in length, belonging to the International Mercantile Marine Company of New Jersey, was on a voyage from Southampton to New York, via Cherbourg, with 168 passengers, mails, and a general cargo, and manned by a crew of about 362 hands. She was in charge of a duly licensed Trinity House pilot. There are two elements outside the action of the two vessels which I propose to consider first. The tide, I may say, was flood, setting up the Solent, force 2 to 2½ knots, and the wind was from about N.N.W., of force 6 or 7, with squalls, and at times before this collision happened there were snow squalls or, as some of the witnesses said, flurries. It seems to me on the evidence that the squalls or flurries, or whatever is the correct expression, were of a thicker character with the *Gladiator*, coming in from the sea, than with the *St. Paul*, coming down the Solent. As to the weather records which were put in, there was one from Calshot lightvessel, which is further up the Solent from the place of collision, at the bend where vessels round, coming down from Southampton, and take a more westerly direction; and that record is, "At 1.50 P.M. sounded fog signal, thick with snow. 2.40 P.M. cleared, ceased sounding fog signal." As far as I can make out from the evidence, that fog signal must have started after the *St. Paul* had passed. The record from Hurst Castle lighthouse records the weather from noon as W.N.W. wind, force 5, and there is the letter S, which means snow. At 3 P.M. the wind is recorded as N.N.E., shewing that it had shifted, force 7, and then there is S and Q, both of which are barred and dotted. The S is snow, which is dotted, which means very heavy, and the Q is squalls, with the same notation on it. That record is half an hour after the collision or thereabouts. What the precise weather was at Hurst lighthouse at the moment of collision does not appear, because these records are only taken at specified times, and it is quite obvious that the weather and wind, in the squalls of snow, were changing with great rapidity. Then the Needles lighthouse records the wind at noon as of force 7, overcast, snow; "3 P.M. wind N.N.W., force 7, O. S., commenced sounding fog signal at 1.25." This is a good way further down. Besides those records, a good deal of evidence was given by various witnesses as to the state of the weather, and the witnesses to some extent differ. They probably differed because in this kind of weather the state of things differs very much from place to place. Without going through all this evidence, I notice that one witness said he could not see seventy-five yards, and it might be so, while at other places the weather was clear.

The conclusion of fact at which I have arrived is that although the *St. Paul* had encountered snow flurries, she had, when the vessels sighted each other, sufficiently clear weather to enable her to proceed down the channel at the speed she did. The evidence of the witnesses from her is, as perhaps you might not unnaturally expect, strongly in favour of that view; but their view received remarkable confirmation from the witness called yesterday, namely, Lady Montagu of Beaulieu, who was in a bungalow at Durns Point. In the course of her evidence she said that she was in her verandah, and she saw the *St. Paul* passing the Solent Bank buoy, which is very nearly abreast, only a good distance away from the bungalow. She said it had been snowing, but then there was a cessation of the squall, and that it would be two miles from where she was that the *St. Paul* passed. I have not exactly measured it; but I think perhaps it is a little overestimated; at any rate it was on the other side of the Solent Bank buoy, and she said she could see the hull, masts, and funnels. Then, I think in answer to a question I put to her, after or during her cross-examination, she said the *St. Paul* was three miles off when she was lost sight of. Now that witness was an extremely able and intelligent person, and her evidence as to the state of the weather at that time is substantially in accord with the evidence given by those on board the *St. Paul.* With the *Gladiator* the case was somewhat different, for she, I think, had met with thicker squalls, and had been sounding her fog signals, though her speed had been about nine knots, which was practically as fast as she was then able to go—working such boilers as she had going—shortly before the *St. Paul* was made out. It was said by Captain Lumsden that she would not steer satisfactorily under the circumstances with less speed, but if the weather had been such as to make that speed unreasonable, and if such speed was really necessary to keep under way properly, he could have anchored his vessel, at any rate for a time, and the Elder Brethren advise me that Totland Bay, which had just been passed, is a very good anchorage, even with the wind as it was; so he can hardly have considered the weather so thick as to have prevented his proceeding at the speed at which the vessel was going. Now, shortly before the collision it seems that a snow squall swept across from about Hurst Castle towards

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the Isle of Wight, and the *Gladiator* was seen by those on board the *St. Paul* coming through this squall, whilst I find that the *St. Paul* was still in clear weather herself, the squall not having yet reached her. Each vessel was sighted from the other at a distance of about half a mile; both sides agree as to that. So much for the weather and wind and tide.

Now the case for the *Gladiator* was that, in the circumstances which I have more or less described, she was heading N. 77° E. magnetic, which is E. by N. a little northerly; and it is said she was keeping to the south side, which would be her starboard side, and sounding her siren at proper intervals; that—I am reading from the statement of claim—"In these circumstances those on board H.M.S. *Gladiator* saw at a distance of about half a mile, and bearing ahead and a little on the port bow, a vessel which proved to be the steamship *St. Paul*. As she came into sight the *St. Paul* was heard to sound two short blasts, and she was seen to be acting under a starboard helm as if intending to pass starboard side to starboard side. The helm of H.M.S. *Gladiator* was accordingly at once starboarded thirty degrees, but the *St. Paul* came on at a great speed, heading for H.M.S. *Gladiator*, and closing in as if under port helm, causing great risk of collision, and, as the sole chance of escaping collision, the helm of H.M.S. *Gladiator* was put hard-a-port to throw her quarter clear. The *St. Paul*, however, with her stem struck the starboard side of H.M.S. *Gladiator*, about amidships, doing her great damage, and causing her to sink shortly afterwards."

The case on the other side is that the *St. Paul* was proceeding down the Solent, on her starboard side of the channel, on a course of W. ½ S. magnetic. If I remember rightly, she passes a cable or a cable and a half to the southward of the Solent Bank buoy, which is the usual course to proceed, and with her engines working at half speed, making from nine to ten knots. Then the third paragraph of the defence says that "in these circumstances a cruiser, which proved to be the *Gladiator*, was seen from a quarter to half a mile distant and bearing about half a point on the port bow. Both engines of the *St. Paul* were at once stopped." That is a most material point, because the evidence was that the engines were stopped in order to see with certainty what the other vessel was. She was painted a grey colour, which made it more difficult to see. Then it is pleaded: "Almost immediately afterwards, when the *Gladiator* had sounded a short blast and was shewing her port side, the helm of the *St. Paul* was put hard-a-port, one short blast was blown, and the starboard engine was put full speed astern. The vessels were then in a position to pass safely port side to port side, but the *Gladiator* starboarded, and, although the port engine also of the *St. Paul* was put full speed astern when the *Gladiator* was seen to be acting under a starboard helm, the *Gladiator* came on at high speed across the bows of the *St. Paul* and with her starboard side a little forward of amidships struck the stem of the *St. Paul*, doing considerable damage."

Those are the two cases, and at the outset of those two cases you have two ships about half a mile apart, approaching each other port side to port side, and each vessel having the other on her port bow. I only need add, with regard to the defence of the *St. Paul*, that it is pleaded, and is the fact, that she was in charge of a duly licensed Trinity House pilot; and the evidence is that he gave all the orders, and all his orders were obeyed. Now it is clear from the courses of the vessels, and the bearing of each from the other when seen, that there ought not to have been the least difficulty in these two vessels passing each other port side to port side, as, in the ordinary course of navigation, they ought to have done; but they are found in collision in a position in which the stem of the *St. Paul* is in contact with the starboard side of the *Gladiator*, at about a two to three points angle leading aft, and such a position was only possible if the *Gladiator* starboarded. That she did so there is no doubt, for it is the case presented on her behalf; but it is said that this was because the *St. Paul* was starboarding and sounded two short blasts on her whistle, and that the *St. Paul* did this because she was about in the place where she would alter her course to proceed down the Needles channel. I shall have to refer a little more closely to the place of collision, but I find that in the ordinary course the *St. Paul* would have proceeded a little further before changing her course, and I do not regard the action attributed to her as probable.

Had she starboarded, remembering that the *Gladiator* starboarded to the extent of some three or four points before she ported to throw her quarter off, I do not see how a collision could have happened; and if that had been the true position of things—that is to say, if both vessels had starboarded, and they had got into a position to pass starboard to starboard—it is most improbable that the *St. Paul*, seeing the other vessel acting in that way, would have ported back. On this point the Elder Brethren are in entire agreement with me. Moreover, when it is remembered that the *Gladiator* starboarded, as her witnesses say, some three or four points, and then ported to throw her quarter off, and it is said that she acts quickly on her helm, and that the angle of the blow was about two to three points, it almost follows that there was very little change in the heading of the *St. Paul*, in fact, from the time of sighting the *Gladiator* till the moment of the collision. Having seen the witnesses and carefully considered their evidence, I am satisfied that the *St. Paul's* helm was not starboarded, and that her manœuvres were substantially as pleaded by her owners in their defence, and that the witnesses from the *Gladiator* who say that the *St. Paul* was swinging to port, which means starboarding, were mistaken.

The next question is, Was there a two-blast signal sounded by the *St. Paul*? This is probably the most controverted question of fact in the case. Every witness from the *St. Paul* says that no two-blast signal was sounded. The officer who was actually sounding the signals, the third officer, on the bridge, says he blew a signal and it was a distinct short blast—that was at the time when the helm was put hard-a-port—and that no two-blast signal was given, and there was no starboarding. Of course it was necessary that I should watch that witness with some care, because he was the person actually giving the signal, and I did so, and I thought him a very clear, intelligent, and reliable witness. As to the witnesses from the *Gladiator*, it is very remarkable that neither Captain Lumsden nor Lieutenant Mainguy, the navigating officer, heard any signal at all from the *St. Paul.* With regard to the other witnesses, of the two who say they heard two blasts, one is not quite sure, and a third says he saw two puffs of steam. The others heard nothing. In addition, some witnesses were called from the shore—the Isle of Wight side. I am afraid I cannot pay much attention to those witnesses, who do not seem to have had any special reason for noticing these whistles at the time, and may have confused different sounds. With regard to the evidence which Lady Montagu gave yesterday I should like to make this observation. She said that she heard two distinct short sharp blasts coming from the direction of Yarmouth: "My impression was that it was a siren, but it was difficult to tell, as it was short and sharp. I should say it was sounded by the same instrument. I heard no others at all. They sounded as two blasts blown in an emergency, the interval between them was very short." In cross-examination a letter which she had written to The Times newspaper, and which was the cause of her being called, was put to her, and in that letter she says: "I very distinctly heard two sharp blasts from a siren which apparently could only have proceeded from one of the two vessels"; and further on, "I am confident that a siren was sounded and that there were two blasts." It seems quite clear that if the sounds she heard from that particular direction were the sounds of a siren, they were not from the *St. Paul*, because we have had it proved conclusively that the *St. Paul* only had steam whistles; but the distance those vessels then were, not more than half a mile from each other, and from Durns Point—three or four miles—makes it very difficult for anybody to be certain that they hear whistles or a siren from a particular vessel when they cannot see that vessel. Although Lady Montagu was confident that she was right, it is quite possible to be mistaken, and I feel very great doubt whether the two blasts came from either of these ships. If they did, we know that immediately before the collision each blew a blast, and one followed the other; and in that locality it is possible there may have been echoes which produced that effect. At any rate, as against the positive evidence which I have from the *St. Paul*, and having regard to what I should like to call, without any offence, the defective evidence from the *Gladiator* herself, I cannot come to any other conclusion than that the two-blast signal alleged to have been given by the *St. Paul* never was in fact given by her. In my opinion those who say they heard two blasts or saw two puffs were mistaken, and I find as a fact that no two short blasts were given by the *St. Paul*, but only one short blast.

If the matter rested there, the blame lies solely with the *Gladiator* for starboarding improperly; but having now dealt with what I consider to be the main contest in this case, namely, whether the *St. Paul* starboarded and blew two short blasts, both of which points I find, as a fact, in her favour, I have to deal with other points which are made against her. Before passing to those points, however, I desire to make one observation on a subject which was pointed out in the course of the arguments in this case, namely, that those on board the *Gladiator* did not give any starboard helm signal at the time they starboarded. I do not think it is necessary to consider this point at all. I do not attach any importance to it in the circumstances of the particular case before me.

I now proceed to deal with the other points made against the *St. Paul*, and I do not think it is going too far to say that they are in reality minor points, but they are important. The first is that the *St. Paul* was in her wrong water; the second, that she was going at an improper speed; the third, that she improperly neglected to sound fog signals; and the fourth, that she neglected to keep a good look-out. The last point I can dispose of in a word; every man was at his post, and there is really no serious suggestion that a bad look-out was being kept on the vessel, and I do not think there was. The look-out was quite satisfactory. With regard to the first of the points, the place of collision, that is, of course, most important. The two sides do not agree about it. I have the chart before me, which was marked both by Captain Lumsden and by the pilot of the *St. Paul*, shewing the alleged different places of the collision. I do not suppose either of the positions is exactly right. It may possibly be somewhere between those two places. The important point is on which side of the channel it was. It is said that the *Gladiator* was to the south side of the channel; but it must be remembered that Captain Lumsden said she was near the middle of the channel and a little to the southward, and, further, that the *Gladiator* starboarded, going at the speed she was going, and ran away a little to the northward. It was also said that the course of the *St. Paul* for the Solent Bank buoy, in the state of the wind, would set her to the southward; and one witness went so far as to say she passed close to a black buoy, which is more inshore than the place where the wreck lies. I can only say about that, that if she had been passing in that position she would have been ashore in a moment or two on the course she was on, and she could not possibly have got to the place of collision which is fixed upon by the witnesses for the *Gladiator*. The position of the wreck has to be borne in mind, but that position may be due, as was probably the case, to the fact that the wind was blowing right on to the shore of the Isle of Wight, and the engines of the *Gladiator* were reversed. On this question of the suggestion of the course of the *St. Paul* being deflected, the Elder Brethren advise me that on the course set by her she ought with her draught and power easily to make that course good, having regard to the local conditions of tide, and notwithstanding the direction of the wind. Also I consider it of importance that the *St. Paul* must have been to the northward of the *Gladiator* as they were approaching each other, because if the courses are laid down N. 77° E. and W. ½ S., and each vessel has the other on her port bow, what I have just said I think follows. Then also it is to be remembered that the *Gladiator* undoubtedly went across to the north under her starboard helm. My finding of fact, therefore, is that the *St. Paul* was not on her wrong side of the channel.

The next question is, Was the *St. Paul* going at an immoderate speed? She had obeyed the directions for Yarmouth, as I may term them, published in 1902, which I understand are intended to prevent the excessive swell which large vessels passing near Yarmouth at a high speed would cause. The directions require that vessels shall proceed at a moderate speed from one mile east of Yarmouth, and, without being absolutely certain as to the exact spot where she slowed, I think it is demonstrated from the log-book which was put in that her speed was reduced to half speed eight or nine minutes before the collision, namely, at 2.20, the collision taking place just shortly before 2.30, and during those eight minutes she had been going at half speed, though, in dealing

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with the calculation of the exact distance run, it must be remembered that she was going at full speed when the change to half speed took place, and it would take some time for that speed to run off to half speed. Her full speed down the Solent, however, had not been her ocean-going speed of eighteen knots —these vessels do not work up the engines to their full speed until they have got clear away—and I think her witnesses are substantially correct in the account they gave of the speed having got down to somewhere about nine to ten knots at the time when the *Gladiator* was made out. Further, I think, as I have already said, that the witnesses were substantially giving a correct account of the visibility up to that period. I have pointed out that the *St. Paul* was not yet in that snow squall which had to a certain extent enveloped the *Gladiator*, and the rule which has to be considered on this point is art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions." The second part of the rule is not applicable, because there was no fog, and the first paragraph which I have just read is not, in strict terms, applicable to the *St. Paul* during the period of her passing down towards the spot where she sighted the *Gladiator*, because she was not then in falling snow—I have found that as a fact—but the question of good seamanship comes into consideration, although the exact terms of the rule are not applicable. Over and over again we have had cases in this Court where a vessel, not herself in a fog, has been blamed because, seeing fog ahead, she has not taken precautions so that her speed shall be moderate when she enters the fog. There is a practical difference with regard to snow, because it is more passing, more cursory, changing from moment to moment, coming on and going; but the same kind of considerations apply. If there is a thick snow squall ahead, so that nothing can be seen in it, good seamanship requires there should be a moderate rate of speed, so as to approach that place under proper control. I have found all the facts which bear upon this point, and upon those facts I have put a question to the Elder Brethren with regard to this point of good seamanship, and the Elder Brethren advise me that on the facts I have found, having regard to the slowing of the *St. Paul* to half speed above Yarmouth, she was not, at the time when the *Gladiator* was seen, going too fast. I see no reason to find that she was going faster than her witnesses say, namely, nine to ten knots, when the *Gladiator* was seen, or to hold that her speed was excessive; and I may add that the Elder Brethren consider that half a mile in such a place, especially when vessels must be generally going in opposite directions, is a sufficient distance for them to avoid each other when going at the speed the *St. Paul* was. I agree with that view.

That brings me to the question of the fog signals. With regard to the absence of fog signals—because it is admitted that none were given on the *St. Paul*—the pilot of the *St. Paul* said that if the *Gladiator* had not been reported he would have slowed down and sounded his whistle just at that particular time. The master of the *St. Paul*, F. M. Passow, who is a very experienced navigator, said: "I thought it was a passing shower, and I did not consider it necessary to use fog signals. I do not think it would have made any difference. We had had snow in places two or three times, but not obscuring. We were just going to slow down when we saw the cruiser." That, in substance, amounts to this: that they had slowed down to half speed some eight minutes before; that they had observed that there was this squall ahead; and that they were about to sound and slow for it, but at that moment the cruiser appeared. Of course it may be said that that is a very happy coincidence, but I have seen the witnesses, and I do not think they were merely inventing the idea. That, however, does not dispose of the question as to what they might have done before the *Gladiator* was seen at a distance of half a mile. Again, the terms of the article do not in strictness apply. The article which it is necessary to refer to is art. 15, which provides that "In fog, mist, falling snow, or heavy rain-storms, whether by day or night . . . . a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast."

As I have already said, the finding of fact which guides me on this point is that the vessel herself was not yet in falling snow, and so the terms of the article strictly do not apply; but it would be again a question of good seamanship whether, in view of the squall seen coming as her witnesses described, she ought to have sounded fog signals. This being a question of good seamanship, I have consulted the Elder Brethren upon the point, and their statement to me is as follows. They tell me that as a matter of seamanship it would have been advisable for the *St. Paul* to sound fog signals before the time when the *Gladiator* was sighted, having regard to the nature of the squall ahead. They are, however, of opinion that the omission to do so made no difference in this case, and in this opinion I concur. To some extent the reasons upon which that opinion is based depend upon questions of fact. I have found the facts, but I may say that their view of the facts is the same as my own.

There is no doubt that the *St. Paul* gave a short blast after the *Gladiator* was seen at about half a mile distant, but very few of those on board the *Gladiator* heard any sound signal at all. Even those who say they heard signals may be mistaken. Any signal made before this would have been when the vessels were still further apart, and there is no probability that if the *St. Paul* had sounded a fog signal it would have been heard on the *Gladiator*. None of the fog signals of the *Gladiator* were heard by the *St. Paul*, except at the last when the vessels were in sight, and that signal was taken to be a short blast. No previous signal, although the siren of the *Gladiator* had been used, was heard on board the *St. Paul*. The wind was strong and squally from N.N.W., across the course (W. ½ S.) of the latter vessel, so that a whistle from the *St. Paul* was less likely to be heard on the *Gladiator* than one from the *Gladiator* to be heard on the *St. Paul*; but, further, if such a signal had been heard, it would only have indicated that there was a steamer approaching down the channel, and her position would not have been ascertained with certainty; and at the time when the *Gladiator* was sighted, as I have already said, there was not the least difficulty in the vessels keeping clear of each other and avoiding collision by the exercise of reasonable care. But for the starboarding of the *Gladiator* there would, in my opinion, have been no collision, and I am unable to see any ground upon which it can be said that the absence of fog signals had any effect upon the collision.

The view which I take of this case renders it unnecessary to consider any question of pilotage, and the result is that the plaintiffs have failed to establish that those on board the *St. Paul* were guilty of fault which led to the collision, and, dealing only with the one case before the Court, in my opinion the *Gladiator* was alone to blame.

Solicitor for plaintiffs: *The Treasury Solicitor.*

Solicitors for defendants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

THE FORFARSHIRE.

1908
June 29, 30.

Admiralty—Ship—Damage—Construction of Contract—Liability for Loss caused by Servant's Negligence—"Finding all Items of Transportation"—"All transporting to be at Owners' Risk."

By a tender in writing, accepted by the plaintiffs, the defendants undertook to carry out certain repairs to the plaintiffs' vessel, and, for that purpose, to "transport vessel from berth to dry dock, finding all tugs, pilots, watermen and boats, sufficient hands for managing ship . . . . and all items of transportation to loading berth." In the margin were printed the words "all transporting to be at owners' risk."

During the transportation of the vessel at night, with the aid of one tug, from dry dock to loading berth, she got adrift from the tug, and sustained damage, owing to the parting of an alleged defective rope belonging to the ship, and to the delay caused by the thimble eye of a wire hawser, also belonging to the ship, not fitting the towing hook:—

Held by Bargrave Deane J., that the defendants were liable, for, after undertaking to find "all items of transportation," they had omitted to ascertain that the necessary items, whether belonging to the ship or not, were efficient for the purpose, and, owing to this neglect on their part, two tugs were, in the particular case, required for the safe handling of the vessel. The defendants, therefore, could not avail themselves of the marginal note as a protection against their own negligence, for the meaning of the contract, in respect of the transportation, was that, if the defendants exercised reasonable care and skill in carrying it out, the plaintiffs would incur the risks incidental to navigation.

BREACH OF CONTRACT.

The plaintiffs were the owners of the *Forfarshire*. The defendants were the London Graving Dock Company, Limited.

The case is reported on the question of the meaning to be attached to the words "all transporting to be at owners' risk" printed in the margin of the defendants' estimate of work to be done to the plaintiffs' vessel.

On January 3, 1908, the defendants, in accordance with a specification supplied by the plaintiffs, tendered for the repair of the *Forfarshire,* an iron barque belonging to the port of Glasgow of 1354 tons gross, and 1300 tons net, register, and 239 feet in length, which had sustained damage by reason of a collision. With reference to taking the vessel from her berth to dry dock, and, after being repaired, to her loading berth, the estimate contained the following clause:—

"Transport vessel from berth to dry dock, finding all tugs, pilots, watermen and boats, sufficient hands for managing vessel, hauling up shore ropes, dock, shore, scrape and clean bottom for examination, including dock dues for two clear days in dock, and all items of transportation to loading berth in the South West India Dock."

On January 9 the plaintiffs, by letter, informed the defendants that their tender was accepted, and on February 6, the repairs having been sufficiently carried out to enable the *Forfarshire* to proceed to her loading berth, she was, about 4 A.M., warped out to the entrance of the Orchard dry dock, where she was taken in tow, stern first, by the *Champion*—a steam tug of 95 nominal and 650 effective horse power—for the purpose of being transported to the South West India Dock; but owing, as the learned judge found, to the negligence of the defendants' servants in the management of the transportation, the vessel came into collision with the Greenwich Linoleum jetty, severely damaging both herself and the jetty.

The plaintiffs alleged that the defendants, in breach of the contract, failed to employ a proper and sufficient number of tugs, and the acts of negligence relied on by them were that when getting near the West India Dock, the vessel having taken a slight cant to the southward, the tug disobeyed the pilot's orders, given with a view to straighten her up, the result being that the vessel was slewed more towards the south shore, and the tug, proceeding at too great a rate of speed, parted the starboard quarter rope, and then slipped the port quarter rope. The vessel by this time having got athwart the river, the pilot ordered the tug to get hold of the vessel ahead; but, through slowness in getting the hawser on to their hook, the propeller of the tug was fouled, and, before an order to let go the anchor could be carried out, the vessel ran stern on into the jetty, and another tug had to be employed to take the vessel to the South West India Dock.

The defendants admitted that the *Champion* was the only tug engaged by them to take the vessel from the dry dock to her loading berth; but they contended that she was efficient for the purpose, that her sole employment was acquiesced in by the master of the *Forfarshire*, and that it was unusual and unnecessary to employ more than one tug for the towage of a vessel of her size and tonnage. They further alleged that the damage was caused by the neglect or default of the plaintiffs in supplying a defective quarter rope, and, alternatively, that if they, the defendants, were guilty of negligence, the plaintiffs were guilty of contributory negligence in causing the said rope to be used. They also alleged that the delay in making fast ahead was due to the thimble eye of the wire passed from the *Forfarshire* being too small for the towing hook of the *Champion*, and, finally, they relied on the marginal note, set out above, and said that the damage complained of was sustained during the transportation of the *Forfarshire*, and that the defendants, by the terms of the contract, were not liable therefor.

1908. June 29. *J. A. Hamilton, K.C.*, and *W. Norman Raeburn*, for the plaintiffs, the owners of the *Forfarshire*. The defendants undertook the transportation of the vessel from dry dock to loading berth, and, for that purpose, they, through their pilot and runners, had the possession and control of the vessel. The master, mate, and apprentices, though on board, had nothing to do with the navigation. The defendants also undertook to find "all items of transportation," and they should, therefore, have ascertained beforehand that these were in proper condition so as to guard against any of them being found insufficient when wanted in the night. If these matters had been seen to, one

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tug might have sufficed; but the rope parting, and the thimble eye of the wire hawser not readily fitting the towing hook, the necessity for two tugs became apparent, as the vessel was, at the critical time, adrift, and before the one tug could be shifted from astern to ahead the mischief was done.

In these circumstances, assuming that the words "all transporting to be at owners' risk" formed part of the contract, they will not help the defendants, as they only refer to the risks of navigation in the course of a towage properly performed. In *Price & Co.* v. *Union Lighterage Co.* (1) the Court of Appeal, affirming Walton J. (2), held that the defendants were not relieved from liability for loss occasioned by the negligence of their servants, although the goods belonging to the plaintiffs were carried in one of the defendants' barges under a contract containing a clause that the defendants would not be liable "for any loss of, or damage to, goods which can be covered by insurance."

In *The Pearlmoor* (3) Sir Gorell Barnes, President, followed the reasoning of Walton J. in the above case, and held that the defendant shipowners were responsible for damage to the plaintiffs' cargo through negligent stowage, although there were a series of exceptions in the bill of lading apparently covering the loss, for the shipowners had not, by express words, indicated their intention to be relieved from liability for the negligence of their servants.

Aspinall, K.C., and *D. Stephens*, for the defendants, the London Graving Dock Company. The evidence of competent witnesses is to the effect that it is not usual or necessary to employ more than one tug for the transportation of such a vessel as the *Forfarshire* from dry dock to loading berth. The argument that two tugs were required to keep the vessel under control would apply to any case of towage where it becomes necessary to cast loose for a temporary purpose, and, in the circumstances of this case, the tug employed was powerful and efficient on a night which, though dark, was fine and clear with no wind. The use of one tug was also acquiesced in by the master of the *Forfarshire*, so that, if one tug was not sufficient, the master should not have

(1) [1904] 1 K. B. 412.

(2) [1903] 1 K. B. 750.

(3) [1904] P. 286.

allowed the vessel to be transported in that way, and was, therefore, guilty of contributory negligence: *The Altair*. (1)

[BARGRAVE DEANE J. One tug was provided by the defendants, and that one tug was under the orders of the defendants' servants.]

The real cause of the accident was the defective condition of the rope supplied by the ship, and which parted at the critical moment.

On the question of the construction of the contract, the cases cited on behalf of the plaintiffs are cases between shipowner and cargo owner, and no doubt the shipowner must shew, by express terms, that he is covered against liability for the negligence of his servants, that is to say, " shipowners are not, strictly speaking, common carriers, but they are under the same kind of liability as common carriers unless that liability is cut down by a special contract," so that, "if the shipowner enumerates a number of perils, and if any of them are brought about by his negligence, he remains liable unless he has excluded negligence in relation to them in express words": per Sir Gorell Barnes, President, in *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (2); but the defendants in this case are not shipowners, and are not in a position analogous to common carriers. In respect of negligence the large and comprehensive words contained in the marginal note that the transportation is to be at "owners' risk" effectually protect them. In *Burton* v. *English* (3), a case of general average, it was stipulated in a charterparty that the "ship should be provided with a deck cargo if required at full freight, but at merchants' risk." Brett M.R. said that "this stipulation would cover any act of the master or crew, which being done by them as servants of the shipowner would otherwise make him liable; it therefore covers the case of improper jettison, also a loss caused by a collision or stranding owing to the negligence of the master or crew"; and Bowen L.J. said that the stipulation would "cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible." In *McCawley* v. *Furness Ry. Co.* (1) the defendant railway company received the plaintiff to be carried under a free pass, one of the terms of which was that the plaintiff should travel at his own risk; and Quain J. said: "The declaration is founded, as it must be, on the negligence of the company by their servants; for a carrier of passengers is not, like a carrier of goods, an insurer; but the agreement under which the plaintiff became a passenger amounted to saying that the defendants should not be liable, as they otherwise would be, for the consequences of an accident caused by their negligence."

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(1) [1897] P. 105.

(2) [1908] 2 K. B. 626.

(3) (1883) 12 Q. B. D. 218, at pp. 220, 223.

J. A. Hamilton, K.C., in reply. The master had no authority to interfere with the defendants as to the way in which they would conduct the operation of transportation whether by one or by two tugs, and as to the parting of the ship's rope, of which the defendants made use for the purposes of the towage, no doubt, in the case of a gratuitous bailment, it is the duty of the lender to communicate to the borrower defects in the article lent of which he is aware: *Coughlin* v. *Gillison* (2); but, so far as the plaintiffs knew, the rope was good, and the cause of the parting was the sudden and undue strain put upon it by the tug. If it was defective, the defendants should have examined it beforehand and provided a better one. The same remark applies to the thimble eye of the wire passed from the ship being too small for the towing hook of the tug, for it was the duty of the defendants to see that the vessel was efficiently equipped before proceeding to tow her to her loading berth.

On the construction of the contract there is no difference in principle between a contract of carriage by sea and a contract of transportation. In either case there must be an express exception to relieve the carrier or the transporter from liability for his own negligence. It may be doubted whether the words "all transporting to be at owners' risk," relied on by the defendants to relieve them from the obligations imposed by the express terms of the contract, form part of the contract, for they are contained in a printed slip up the side, but if they do, the result is an ambiguous document which is no protection to the

(1) (1872) L. R. 8 Q. B. 57, at p. 60.

(2) [1899] 1 Q. B. 145.

defendants: see per Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick.* (1)

June 30. BARGRAVE DEANE J. This is an action of damage for breach of contract. The contract is contained in a specification and a letter of acceptance.

The material facts are these. The *Forfarshire*, an iron barque of 1300 tons, had been damaged in collision. She was brought to the Thames and she was docked, and eventually she was taken to a dry dock by the defendant company to be repaired, and having been repaired, or partly—I believe the repairs were not altogether finished, but they were finished so far as the dry dock was concerned—she was to be transported from there to the South West India Dock. The contract included that transporting. It is true that the master and the mate and the apprentices were on board, but so far as they were concerned they were mere dummies in the matter. The ship and her appurtenances were in the hands and under the control of the defendants' pilot and a crew of runners.

It is obvious from the contract that the defendants had to supply "all items of transportation." That means that they must see before they start that they have everything in readiness for the safe conduct of that transportation. The Elder Brethren impress upon me that there were many matters which ought to have been seen to. First of all, you have to take into account that the vessel was to be moved on a dark night, when you could not at the moment see readily anything which might have to be attended to. Therefore it is important that you should beforehand take every precaution to be prepared for an emergency. The vessel had to be towed, leaving out the question of one or two tugs for the moment. She required sufficient and proper ropes. In addition, you have to see in case of accident that her anchor was ready to be let go, and, if you have only one tug, you must see that your forward ropes are in good condition and ready to be attached. All these things should be provided for, and provided before the actual transportation takes place, and at a time when anything that is wrong can be remedied.

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(1) [1905] A. C. 93, at p. 96.

That being so, this vessel was towed out in the dark morning by one tug stern first, with two ropes, one from her starboard quarter and one from her port quarter, attached to the stern of a powerful tug, a tug we all know in this Court, called the *Champion.* After being towed a certain distance the pilot noticed that the vessel's stern was canted too much to the south shore. He sang out to the tug to tow off the port quarter to check that cant. By negligence on behalf of the tug, instead of towing off the ship's port quarter, she towed off her own port quarter, which was the ship's starboard quarter, with the result that the cant, which ought to have been corrected, was increased. The pilot at once tried to correct that, and it was manifest from what happened that the tug thereupon—not as I expect the pilot put it, progressed to the other quarter—went as fast as she could to correct the mistake, with the result that an undue strain was put upon this starboard quarter rope, and it parted then and there, and by reason of that rope parting, or by inattention, the port rope got off the hook and the ship was adrift. The ship, being adrift, was in a position of considerable difficulty. It is true it was slack tide, the top of high water, with little or no wind, but she was going—and it is quite clear she had been towed—too fast, which is another matter the Elder Brethren have impressed upon me. She was being towed at such a rate that when these ropes parted she went bodily on to this wharf, which is on the south side of the river. Therefore there was, by the conduct of those who were employed by the defendants, a considerable difficulty raised. If there had been a second tug there would have been no risk, but I wish carefully to guard myself against saying that these transportations should be undertaken by two tugs. I do not wish to hold anything of the sort, but I say, in this particular instance, that with the neglect to make the previous investigation as to the condition of the ropes and the condition of the anchor, and the condition of the bow chain or hawser, the wire hawser forward, a second tug was on this occasion necessary. The pilot gave orders to let go the anchor. That had not been provided for, and it could not be let go. They tried to get the wire hawser fast to the tug which went forward on to the bows, but they could not get it fast. All this shews that there was considerable negligence on behalf of those who were employed by the defendants to transport this vessel from the graving dock to the South West India Dock.

That being so, I am of opinion that there was a breach of this contract, and that the defendants did not do that which they contracted to do, namely, to find—to use the words of the contract—" all items of transportation " of this vessel to the South West India Dock. That being so, a point of law is raised. It is said that if you look at the side of this contract, the contract being in type, you find printed along the side of the contract, " All transporting to be at owners' risk." On the one side it is said that that saves the situation for the defendants, and that, of whatever negligence the defendants were guilty, still the object was that all the risk should be still the risk of the owner of the ship. On the other side it is said, " No. It is true that it meant to protect the defendants against certain accidents which might happen, but it was never intended to protect them against their own negligence." Cases have been cited on one side and the other about it.

I am clearly of opinion that this particular printed indorsement in this particular case does not protect the defendants. It would be monstrous to suppose that it was in the contemplation of these two parties that, whatever neglect there might be on the part of the defendants to perform their part of the contract, still the plaintiffs would be responsible if any accident happened to the ship. In my opinion that which happened is outside the purview of this particular indorsement on this agreement. I think it may very well be that what was in view was that, the defendants performing all their duties in respect of this contract, if anything happened, then the plaintiffs should suffer any expense which might be incurred; but I do not think it was intended to protect the defendants against the neglect on their part to carry out their part of the contract. Otherwise it would be absolutely unintelligible to anybody who had to construe the contract. I do not go so far as putting the case on a par with the case of *Elderslie Steamship Co.* v. *Borthwick* (1), which was cited by counsel for the plaintiffs, because I do not think there is any ambiguity in this particular contract. I think it is perfectly plain that there was on each side an undertaking—the defendants undertaking to do certain things, and the plaintiffs undertaking to bear the risk if those things were done. The defendants have failed to do that which they undertook to do; therefore they cannot look to the plaintiffs in their part of the contract to carry out the contract on their part. I find, therefore, in this case that the plaintiffs have succeeded in establishing their claim against the defendants for the damage sustained by reason of this breach of contract, the measure of the damage being the expense to which they were put in having the damage repaired, occasioned by the neglect on the part of the defendants.

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(1) [1905] A. C. 93.

There will be judgment for the plaintiffs with costs, and a reference to the registrar to assess the amount of the damage.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *E. F. Turner & Sons.*

T. L. M.

1908
July 23, 24.

WRIGLEY *v.* LOWNDES AND OTHERS.

Special Power of Appointment—Will—Exercise by earlier Will—No express Clause of Revocation—Complete Exercise of Power—Later Will alone admitted to Probate.

Whether a special power of appointment has been exercised or not by will must depend, in the absence of any specific reference to the power, or the property subject to the power, upon whether it can be gathered from the terms of the will that the donee of the power had the power in mind and meant to exercise it.

The testatrix (donee of a special power of appointment) made a will by which she duly and in terms exercised such special power of appointment. In a later and holograph will executed by her were these words, "I wish to leave at my death everything I have power to will to my husband":—

Held, that the testatrix meant to exercise and did exercise the special power by the later will, and that that will revoked the earlier will.

In re Weston's Settlement, Neeves v. *Weston*, [1906] 2 Ch. 620, referred to.

THE question here raised on the construction of a will was as to whether the testatrix, the donee of a special power of appointment, had effectually exercised that power.

The material facts are set forth in the head-note and judgment.

Micklem, K.C., and *Bayford*, for the plaintiff. There remains only the question whether the testatrix had in her mind the existence of the power and its exercise. The words used in the second will are ample to shew that she had: *In re Teape's Trusts*(1); *Thornton* v. *Thornton* (2); *Kent* v. *Kent and Others* (3); *In re Waterhouse, Waterhouse* v. *Ryley*. (4)

Atkin, K.C., and *R. H. Pritchard*, for some of the defendants. Assuming that the second will revokes the first and is alone to be admitted to probate, the question is whether the second will contains such a reference to the power as to shew an intention to execute it: *In re Esther Williams, Foulkes* v. *Williams*. (5)

The only possible construction of the second will, which disposes of property apart from the power, is that it gives an absolute estate to the husband, but the only power the testatrix had was to appoint a life interest.

The Wills Act (1 Vict. c. 26), s. 27, does not help this case, because it only applies to a general power of appointment, and this is a special one. [They also referred to *Sykes* v. *Carroll* (6); *Brodrick* v. *Brown*. (7)]

Barnard, K.C., and *Willock*, for the first two defendants on the record, did not argue.

Micklem, K.C., in reply. An express reference to the power is not necessary. There are alternatives, e.g., a reference to the property subject to the power or an intention, otherwise expressed in the will, to exercise the power: *In re Weston's Settlement, Neeves* v. *Weston*. (8)

July 24. SIR GORELL BARNES, PRESIDENT. The facts of the case are that on March 25, 1904, the deceased Katherine Wrigley, late of The Priory, Hoylake, in the county of Chester, executed a will which contained a clause as follows: "In exercise of the power in this behalf me hereunto enabling under and by virtue of the will with the codicil thereto of my father, Walter Barton Wignall, deceased, which will bears date the 6th day of March, 1894, and which codicil bears date the 20th day of September, 1895, and of which will and codicil my brother Frederick William Wignall, ... Ernest Campbell Lowndes, and my father's cousin Edward Wignall are the trustees and executors, and of every other power me hereunto enabling, I appoint to or in favour of my husband, the said Arthur Harold Wrigley, the sum of 400*l.* a year, payable out of the yearly income of my share of the trust fund passing under the said will calculated from the date of my death or of the death of my mother, whichever shall last happen, during such portion of his life as he shall remain my widower and not be married again."

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(1) (1873) L. R. 16 Eq. 442.

(2) (1875) L. R. 20 Eq. 599.

(3) [1902] P. 108.

(4) (1907) 77 L. J. (Ch.) 30, C. A., affirming 96 L. T. 688.

(5) (1889) 42 Ch. D. 93.

(6) [1903] 1 I. R. 17.

(7) (1855) 1 K. & J. 328.

(8) [1906] 2 Ch. 620.

That clause in her will is the result of a power which was contained in the will referred to in the said clause. The power conferred by Mr. Walter Barton Wignall's will is in these terms: "I empower my daughter by her will to appoint to or in favour of her husband the whole or any part of the yearly income of the share of the said trust fund for any period determinable on or before the death of such husband, but so that on his marriage again the benefit to be derived by him under or by virtue of such appointment shall during the existence of any issue of his marriage with my said daughter be limited and extend to the annual income of one-third only of her same share. . . . ."

One other document has been referred to, and, although I do not think it has a strict bearing on the question before the Court, I understand that it may have a bearing if the will executes the power. A settlement, which was, I think, post-nuptial and supplemental to his second marriage, was made by Walter Barton Wignall on April 14, 1886, and it contains a clause as follows: "Provided always that each daughter of the said Walter Barton Wignall may (notwithstanding the antecedent trusts) by her will appoint that in the event of her dying without leaving issue her surviving or such issue so surviving her shall not afterwards under the trusts aforesaid obtain a vested interest in her share of the said trust fund, the income of her share of the trust fund shall, from and after the failure of such issue, be paid to her husband (if any) during such portion of his life as he shall remain her widower and not married again or for any shorter period."

These two powers were possessed by the deceased at the time of her death; one of them is referred to and noticed by her will of March 25, 1904.

But before her death, which occurred on May 2, 1907, she made a new and very short will, which is in these terms:—

> "I wish to leave at my death everything I have power to will to my husband Arthur Harold Wrigley.
>
> "March 28th, 1907.
>
> "Katherine Wrigley.
>
> "Witnessed by M. Sudden.
>
> "Witnessed by B. Banks."

I am satisfied that this document was duly and properly executed and attested.

The husband, who is the plaintiff in this case, says that this is the only document which should be admitted to probate, on the ground that it not only disposed of such small amount of property as the deceased herself possessed, but was a will which, by the light of facts which she must have known, exercised the power of appointment which she possessed. The allegation in the statement of claim is, "that the deceased by her said will dated the 28th day of March, 1907, duly exercised the power of appointment and revoked the said will dated the 25th day of March, 1904."

The defendants Ernest Campbell Lowndes and Charles Mylne Barker, as executors of the will of March 25, 1904, in substance say "that the power of appointment conferred upon the deceased by the will and codicil of her father, Walter Barton Wignall, deceased, was a special power of appointment, and that by the terms of the will dated the 28th day of March, 1907, the deceased did not duly exercise the same nor did she revoke the will dated the 25th day of March, 1904."

The other four defendants plead that "neither of the said wills exercised the power of appointment given to the deceased by the will and codicil of her father," and they ask the Court to pronounce against both the said wills.

That leaves a very short question for decision. I do not say that the question of execution of powers is a very simple matter. But when one comes to examine the most important of the cases on the subject, they all turn on the application of general principles—principles which are laid down and applied with more elasticity at the present day than formerly—to the particular words and facts of the particular case before the Court.

The only use of the case is to establish and emphasize a general principle.

I take, for my statement of the principles, the words of Buckley L.J. in *In re Weston's Settlement, Neeves* v. *Weston* (1), where he says: "For the exercise of a special power there must be either (1.) a reference to the power, or (2.) a reference to the property subject to the power, or (3.) an intention otherwise expressed in the will to exercise the power." All that that really means is whether one can gather, from the terms of the will itself, that the testatrix had in mind that she had a power and meant to exercise it.

Turning, then, from the principle, let us look at the form of this last will.

It is not in the ordinary general terms we have so often met with in the case of holograph wills, saying that the testator or testatrix leaves everything to the wife or husband, as the case may be. But this will shews that the testatrix knew she had the power and meant to exercise it. It is capable, no doubt, of disposing of the property which she herself possessed; but it is hard to say that she did not intend to dispose of the property under the power. "I wish to leave at my death everything I have power to will to my husband"—very short and very emphatic. Bearing in mind the facts which she must have known at the time, I hold that she meant to exercise, and did exercise, the power which she undoubtedly possessed.

This document, therefore, is alone admissible to probate, as it revokes any will that went before it. I pronounce for the last will, and for that alone.

The declaration I make, at the request of counsel, is that the deceased by this will executed the special powers conferred upon her by the will and by the settlement; and the pleadings may be amended so as to cover that declaration about the settlement.

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(1) [1906] 2 Ch. 620, at p. 624.

The costs of all parties, as between solicitor and client, may be paid out of the estate.

Solicitors for plaintiff: *Sharpe, Parker, Pritchards, Barham & Lawford, for Grierson & Martin, Liverpool.*

Solicitors for first two defendants: *Charles Mylne Barker & Co.*

Solicitors for other four defendants: *Chester, Broome & Griffithes, for W. F. Morecroft, Sproat & Killey, Liverpool.*

H. D. G.

IN THE ESTATE OF FANNY DEBORAH MEYER.

1908 July 27.

Testamentary Papers—Execution by one Person of Codicil of the other Person——Mistake—Intention—Effect—Refusal of Probate.

Two sisters executed codicils similar in terms. By mistake each sister executed the codicil intended for, and purporting to be, that of the other.

Upon application after the death of one of the sisters for probate of the codicil executed by her:—

Held that, the intention to execute the document propounded being wholly absent, probate must be refused in respect of the whole document, notwithstanding that it contained some testamentary dispositions which were intended by the testatrix, being, in fact, common to the two documents executed.

FANNY DEBORAH MEYER and her sister Emilie Meyer for many years resided together, keeping a joint establishment.

Some time before March, 1907, they, not for the first time, executed mutual wills.

On March 4, 1907, their solicitor went to their house by request and took instructions from both of them to make codicils to their respective wills in similar terms, and he made a note of these instructions on the original paper whereon he had taken instructions for their wills.

After the death of one of the sisters it was discovered, on opening the envelope containing the will of the deceased, that she had executed the codicil intended for her sister, and the sister had executed the codicil intended for the deceased.

Although two solicitors and an articled clerk were present when the documents were executed, no one appeared to have noticed the mistake. The solicitors who then acted for the deceased and her sister, and who had been their solicitors for many years, were not the solicitors now retained and instructing counsel.

The Court was moved to grant probate of the will and codicil, omitting from the latter the names of the testatrix and her sister wherever mentioned therein.

The surviving sister, who was the residuary legatee under the will of the deceased, consented to the motion.

Barnard, K.C., and *Bayford*, in support of the motion. There is no reported case in point, but it is submitted that the order asked for would be merely an extension of the principle recognized in *In the Goods of Boehm* (1) and that class of case.

Sir Gorell Barnes, President. It is unfortunate that such a difficulty as this has arisen, especially having regard to the fact that a solicitor's clerk witnessed the document. But it is quite clear that this lady, though her signature is on the document, never meant to sign this particular codicil at all. She meant to sign a totally different document. It may be that this document contains provisions corresponding with what she wished to sign, because the two documents were cross-codicils by two sisters. But, as a matter of fact, the deceased in signing her name to this codicil never intended to do that at all, but intended to put her signature to another document; and, unless some authority can be produced to me to shew that in such a case the document she did not intend to sign is to be treated as the one she did intend to sign, I do not mean to support it. In my opinion this codicil cannot stand. The will, of course, can be proved in the ordinary way. The lady who takes the chief benefit under the will, and whose interest would be diminished somewhat by the codicil, might very well carry out her deceased sister's wishes by allowing the money which the deceased wished to dispose of by the codicil to be paid out before taking her

(1) [1891] P. 247.

interest under the will. She is, I understand, executrix under the will; and, though she does not want the inconvenience of taking probate, she can do so and appoint somebody to manage the matter for her.

Solicitors: *Lumley & Lumley.*

H. D. G.

HAMPSON *v.* HAMPSON.

1908
July 20, 27.

Divorce—Practice—Costs—Date of Marriage wrongly stated in Petition and Decrees—Motion to amend—Order.

The petitioner and respondent, after having been married in a registrar's office, went through the form of marriage in a parish church. In a petition for dissolution of marriage, and in the decrees nisi and absolute pronounced thereon, the second marriage only was referred to.

Upon affidavit of service of notice of motion upon the respondent, the Court ordered that the petition and decrees be amended by inserting therein the date of the first marriage.

ON March 13, 1899, the petitioner (wife) was married by licence to the respondent at the registrar's office in the district of Chorlton, in the county of Lancaster, and on June 21, 1899, a form of marriage was gone through by the petitioner and respondent at St. Mary's Church, Birmingham.

On October 1, 1906, the wife presented a petition for dissolution of marriage. In that petition the marriage was stated to have been celebrated at St. Mary's Church, Birmingham, on June 21, 1899, and the decree nisi and decree absolute which the Court subsequently pronounced referred only to that ceremony of marriage.

The petitioner now moved that the decrees nisi and absolute might be rectified by inserting therein the marriage at the registrar's office instead of the subsequent ceremony of marriage in church.

Notice of this motion had been served on the respondent's solicitor.

Willock, for the petitioner, in support of the motion.

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SIR GORELL BARNES, PRESIDENT. I think the right thing to do is to amend the petition as well as the decrees made thereunder. On affidavit of service of notice of the motion, the petitioner may take the order for amendment of the petition and decrees; but no costs of this ought to be taxed against the respondent.

Solicitors: *Lumley & Lumley*.

H. D. G.

1908
July 27, 28, 29, 31.

THE SCHWAN.

Admiralty—Ship—Bill of Lading—Damage to Cargo—Seaworthiness—Negligence of Shipowners' Servants.

A cargo of sugar was shipped at Bremen for conveyance to London under a bill of lading containing (inter alia) the following exceptions and conditions:—(1.) "all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or . . . . from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or . . . . otherwise and the owners being in no way liable for any consequences of the causes before mentioned." (2.) "It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

On the voyage the sugar was damaged by the inflow of sea water into the hold owing to the plug of a "three-way cock," fitted on the main bilge pipe, not having been turned so that the cock would only be open at one time in two directions, and the learned judge at the trial found as a fact that the chief engineer had not made himself acquainted with the proper adjustment of the cock in question when employed by the owners of the vessel, whilst she was being built, to superintend the fitting of the machinery:—

Held, that the defendant shipowners were liable for the damage to the sugar as their agent had not exercised reasonable care within the meaning of the second clause in the bill of lading.

DAMAGE TO CARGO.

The plaintiffs were Abram Lyle & Sons, Limited.

The defendants were the owners of the steamship *Schwan*.

Under bills of lading, duly indorsed to the plaintiffs, dated November 26, 1907, and signed by the agent of the defendants on their behalf, 5500 bags of sugar were shipped by J. H. Bachmann, in good order and condition, on board the *Schwan*, at the port of Bremen, to be delivered in the like good order and condition unto order account Lyle at London.

The defendants failed to deliver some of the bags of sugar at all and delivered others in a greatly deteriorated and damaged condition, and the plaintiffs, by their statement of claim, alleged, inter alia, that they had "suffered damage by the breach of a contract between the plaintiffs and the defendants to carry the plaintiffs' goods in the *Schwan* from Bremen to London for reward to the defendants in that behalf, and on the terms, amongst others, that the said vessel should be seaworthy and reasonably fit to carry the said goods on the said voyage, yet the said vessel was not at the time when she sailed on the said voyage seaworthy for the same and reasonably fit for the purpose aforesaid, whereby the said goods, or some part of them, were lost and damaged and deteriorated as aforesaid."

The "particulars of unseaworthiness" were that "the main hold bilge suctions and the connections and valves thereof or some of them were obstructed or were otherwise in a defective imperfect or inefficient condition and of defective design whereby water was enabled to reach the said goods lying in the said hold."

The defence, so far as material, was that the defendants were not liable as the damage was caused by one or some of the matters in clause 1 of the bill of lading, and that they (the defendants) exercised all reasonable care and diligence as provided by clause 10.

The following were the exceptions and conditions in the bill of lading relied on:—

"1. The act of God . . . . and all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or from perils of the seas ports harbours canals and rivers or from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or other craft or otherwise and the owners being in no way liable for any consequences of the causes before mentioned.'

"10. It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

The action was tried on July 27, 28, and 29, 1908, and, as more fully appears from the judgment, delivered on July 31, the learned judge (who was assisted by two of the Elder Brethren of the Trinity House) found that the damage to the cargo of sugar was caused by the admission of water into the hold through a "three-way cock" the plug of which had not been properly adjusted by the chief engineer of the vessel, and the question of the liability of the defendant owners of the *Schwan* turned on the effect, with reference to the acts or omissions of the chief engineer, of clause 10 of the bill of lading above set out.

Laing, *K.C.*, and *R. H. Balloch*, for the plaintiffs, the owners of cargo.

Scrutton, *K.C.*, and *A. D. Bateson*, for the defendants, the owners of the *Schwan*.

The arguments of counsel sufficiently appear from the judgment. On the question of unseaworthiness the following cases were cited: *Steel* v. *State Line Steamship Co.* (1); *Hedley* v. *Pinkney & Sons Steamship Co.* (2); *The Cargo ex Laertes* (3); *Stanton* v. *Richardson* (4); *Upperton and Wife* v. *Union Castle Mail Steamship Co.* (5) and Carver on the Carriage of Goods by Sea, 3rd ed. (1900), s. 18. On the question of negligence of the servants of the shipowner after shipment, *The Torbryan*. (6)

Cur. adv. vult.

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(1) (1877) 3 App. Cas. 72.

(2) [1894] A. C. 222.

(3) (1887) 12 P. D. 187.

(4) (1872) L. R. 7 C. P. 421; (1874) L. R. 9 C. P. 390.

(5) (1903) 19 Times L. R. 687.

(6) [1903] P. 194.

Bargrave Deane J. This is an action brought by Messrs. Abram Lyle & Sons against the owners of the steamship *Schwan* for damage occasioned to a cargo of sugar which was shipped at Bremen under bills of lading, dated November 26, 1907, for carriage to London.

The *Schwan* was a new ship. She had been quite recently built at the Rostock yard, in Germany, and passed by the German Lloyd and by the Board of Trade. I think she is a passenger ship of the first class. The bills of lading shew that 5500 bags of sugar were shipped, and when the vessel arrived in the Thames it was discovered that a large quantity of water had got into the afterhold, with the result that the cargo there was practically all spoilt; and the question is whether under the bills of lading the owners of the ship are responsible for the damage to the sugar. On the one side it is said by the shipowners that the conditions and exceptions in the bills of lading are such that they are not responsible. On the other side it is said that the cause of this injury was a defect in the machinery, which would have been palpable to any one who had taken the trouble to find it out, and that the responsibility rests with the shipowners. What I have to ascertain is this: Under the terms of the bills of lading, am I to treat the contract as amounting to a carriage at owner's risk? That was practically the contention of the defendant shipowners. The two principal paragraphs in the bill of lading are these: [The learned judge read clause 1 in the bill of lading already set out, and continued:—] Now, that is a very strong clause, and it is covered by paragraph 10, which says: [The learned judge read clause 10 already set out.] It seems to me that the whole of this case depends upon clause 10. Did the shipowners or their agents exercise reasonable care and diligence in connection with the ship, her tackle, machinery, &c.?

Now the trial has been of a rather technical character. We have had to go with some detail into the condition of the machinery of the ship connected with her pumping apparatus, and it appeared that she had as part of her machinery what is called a three-way cock. It was a pipe with a three-way junction, one open to the sea to let in the water, one open to the bilge, and

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Bargrave Deane J.

one open to the pump. Now this three-way cock was worked with what was technically called a plug, and that had two openings in it, with the result that when you turned the plug it was supposed to open to two of the ways only, and not into three. For instance, you always want to open to the sea, and you open the second of the arrangements either to the bilges or to the pumps. As it turned out, this particular plug with two openings was so constructed that if the plug was not very carefully turned it might possibly be partly open to all three of the ways instead of only two. In this particular case it was partly open to all three, with the result that the water passed through into the pipe which led into the hold. There was towards the end of the main pipe a long return valve, which should have kept any water which got into the pipe from passing into the hold, but, unfortunately, into the valve there had got a piece of spun yarn, which prevented that valve from being screwed down. Those two matters were the cause of the injury to the cargo, because water passed by the three-way cock down the pipe towards the hold, and by reason of the valve being blocked it passed through into the hold. That is the cause of the damage. How comes it that that happened? Now I am sorry to say that in coming to the conclusion I do come to I have to find that the chief engineer of the *Schwan* is not to be relied upon. I rely entirely upon the evidence of the superintendent engineer of the steamship company. He has given his evidence most clearly and conveyed to my mind the absolute truth. On the other hand, the evidence given by the chief engineer was very contradictory, and in my opinion was not reliable.

This ship was built in the Rostock yard. The owners employed the chief engineer to be at the yard and superintend from the beginning the putting together of the machinery, to pass it and get thoroughly acquainted with it—a most proper precaution. He knew about this three-way cock being put into the ship, and he ought to have discovered at the time that the plug of this three-way cock was not to be depended upon so as to be safe. He ought to have known that unless it was very carefully manipulated there was possibility of its being partly open in all three ways at once. He says he knew it. I am sorry to say that I do not believe him, because, from the evidence of the superintendent engineer, it is clear that he did not. Without going at too great detail into that part of the case, I have to read the evidence of the superintendent engineer. He says he thinks the three-way cock was a good one. He expected that it would only open in two directions at once. He first knew it would open in three ways at once after the chief engineer told him so on the voyage from London back to Bremen. "The chief engineer told me he had found out." That must mean he had found it out recently, and not that he had known it all along. It is quite clear that the chief engineer and the superintendent engineer did not know up to the time Mr. Winstanley made his report anything about the plug of this three-way cock opening all three ways at once. The fact of its being possible for that plug to open all three ways at once was a matter which ought to have been known to the chief engineer from the time he took charge of the arrangements of the machinery. He told us he knew about it. He says he opened that three-way cock in all three ways purposely. How can that be true in face of the evidence of the superintendent engineer, which I absolutely accept? I do not believe the chief engineer knew that three-way cock would open three ways instead of two. It was not intended to open three ways. It was intended to open two only at one time, and therefore my belief is that the chief engineer neglected to test it at the time when he was placed by the owners in charge of the building of the ship and the arrangement of her machinery in the Rostock yard. That being so, I am of opinion that this comes within paragraph 10 of the bill of lading, and that the shipowners, through their agent, the chief engineer, did not exercise reasonable care and diligence in connection with "the ship, her tackle, machinery," &c.; and the whole of this accident is due to that fact. I finish as I began. The argument on behalf of the shipowners is practically that the sugar was carried at owners' risk. They have not had the courage to put that forward in so many words, but counsel for the defendants said the exceptions covered everything possible. I think, fortunately for the owners of the cargo, they have left open one door by which the plaintiffs are entitled to succeed. Therefore my

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judgment is for the plaintiffs, on the ground that the defendants have not established due care, through their agent, in the arrangement of the machinery of the ship.

Solicitors for plaintiffs: *Cattarns & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

1908
July 23.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY ALAN NEVILLE BANISTER AND EMILY BLANCHE (HIS WIFE) *v.* HENRY THOMPSON (CLERK).

Ecclesiastical Law—Criminal Suit by Letters of Request—Church Discipline Act (3 *&* 4 *Vict.* c. 86), s. 13—*Refusal to administer the Holy Communion—Marriage with Deceased Wife's Sister—Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, c. 47), s. 1—*Persons not included under Description of "open and notorious evil liver so that the congregation be thereby offended."*

Lay members of the Church of England who have been baptised and confirmed, and between whom a marriage legalized by the Deceased Wife's Sister's Marriage Act, 1907, has been solemnized, are not, either by reason of such marriage or by their afterwards living together as husband and wife, open and notorious evil livers within the rubric in the Communion Service, and neither the solemnization of their marriage nor their subsequent cohabitation justifies the incumbent of the parish in which the parties reside in repelling them from the sacrament of the Lord's Supper.

A domiciled Englishman who had gone through the form of marriage with his deceased wife's sister, a domiciled Englishwoman, in a Presbyterian church in Canada, after the passing of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, but before the Deceased Wife's Sister's Marriage Act, 1907, had come into force, and after the marriage had returned to reside in England, applied, after the coming into force of the last-mentioned Act, to the incumbent of the parish in which he was residing together with his wife that, they being both members of the Church of England, and having been baptised and confirmed, should be admitted to the sacrament of the Holy Communion. The incumbent repelled the applicant and his wife from the Holy Communion, and on their promotion a criminal suit by letters of request was thereupon instituted against the incumbent:—

Held, that the promoters had been illegally repelled from the Holy Communion, and that the incumbent must be admonished for having so repelled them and to refrain from similar acts in the future.

THIS case came before the Court by virtue of letters of request signed by the Bishop of Norwich in the first instance under s. 13 of the Church Discipline Act.

The letters of request recited that the Rev. Henry Thompson, a clerk in holy orders of the Church of England, the vicar of the vicarage and parish church of Eaton, in the county of the city and in the diocese of Norwich, honorary canon of Norwich Cathedral, was charged with having within the said diocese of Norwich, and within two years then last past, offended against the laws ecclesiastical by refusing to receive for Holy Communion Alan Neville Banister and Emily Blanche his wife, parishioners of Eaton aforesaid, the ground of refusal being that the said E. B. Banister was the sister of the first wife of the said A. N. Banister; and the Bishop of Norwich having affixed his signature thereto on February 1 last, the letters of request were duly accepted, a decree by letters of request issuing on March 4 last and being served on the respondent two days later.

An appearance having been entered for the respondent, the articles were brought in on March 13 last. They described the respondent in similar terms to the recitals in the letters of request, and, as subsequently amended by consent, contained in paragraphs 2, 3, 4, and 5 the following allegations:—

(2.) The said A. N. Banister, one of the promoters in this suit, is the manager of the Electrical Tramways Company at Norwich, and of established position and character. He is a baptised and confirmed member of the Church of England, and has for the last seven years and upwards been, and still is, an inhabitant and parishioner of the said parish of Eaton, and during the whole of that time up to the month of July, 1907, had been a regular attendant at divine service at the church of the said parish and a frequent communicant. He also took part in church work in the said parish, and was, up

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to the said month of July, 1907, on very friendly terms with the defendant, who from the year 1904 had been vicar of the said parish.

(3.) In the month of July, 1907, the said A. N. Banister, having been then for some time a widower, was desirous of marrying his present wife, the promoter E. B. Banister, who is the sister of his deceased wife, under the impression that the marriage taking place in Canada would be valid in England under the Colonial Marriages (Deceased Wife's Sister) Act, 1906. (1) He thereupon informed the defendant of his said intention, and shortly afterwards the defendant informed the said A. N. Banister that under the law of the Church he (the defendant) would in such case not be permitted to receive the said A. N. Banister to Holy Communion.

(4.) The said A. N. Banister protested to the defendant against this course, and then proceeded to Canada, where on August 12, 1907, he was married at the church of St. Giles, Montreal, to his said present wife. The said marriage was a valid marriage according to the law of Canada, and was rendered valid in England by the Deceased Wife's Sister's Marriage Act, 1907, which came into operation on August 21, 1907.

(5.) In the second week of September, 1907, the said A. N. Banister and his wife, who is also a baptised and confirmed member of the Church of England, returned from Canada to Eaton aforesaid, where they have since resided.

The 6th paragraph of the articles set out a correspondence which took place in October, 1907, between the promoter A. N. Banister on behalf of himself and his wife and the respondent on the promoters desiring to present themselves for Holy Communion at the parish church of Eaton, and from which correspondence it appeared that the respondent declined to admit the promoter A. N. Banister to Holy Communion on the ground, as stated by the respondent in a letter of October 17, 1907, that he, the said A. N. Banister, had knowingly and wilfully contracted a union which was declared unlawful "both by the Church and the law of the land," and that if he presented himself for Holy

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(1) 6 Edw. 7, c. 30.

Communion the respondent would certainly refuse to communicate him. (1)

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(1) The correspondence so set out in the articles was, so far as material, in terms as follows:—

"Edgewood, Eaton, Norwich,
"Oct. 8, '07.

"Canon Thompson.

"Dear Sir,—Adverting to your letter of July 12 last, I beg to inform you that Miss Petersen and I were married in August last, and I wish to know, as a member of the Church of England and a parishioner, (1.) if you adhere to your intention to refuse to administer the sacrament of Holy Communion to Mrs. Banister and me; (2.) if so, do you justify your refusal on the same grounds as indicated in your letter above referred to, namely, that Mrs. Banister and I are 'open and notorious evil livers'? I await your reply.

"Yours faithfully,
"Alan N. Banister."

"The Vicarage, Oct. 9, '07.

"Dear Sir,—I have nothing to guide me at present but the Bishop's direction, which I repeated to you, and with which I was in accord. But you may have observed in the papers that this conflict between Church law and State calls for a consultation of the Bishops, and I will ask to await the result of that.

"Yours faithfully,
"Henry Thompson."

"Edgewood, Eaton, Oct. 10, '07.

"Canon H. Thompson.

"Dear Sir,—I beg to acknowledge receipt of your letter of the 9th instant. I do not consider it reasonable that I should be asked to wait for an indefinite time, and I would remind you that in my reply to your letter of the 10th July I gave you the opportunity to reconsider your refusal and asked you to pause. You, however, did not accept my suggestion. The time for deliberation therefore has passed, and I must press for what is my undoubted right, namely, an immediate answer to my questions. The directions of the rubric are quite clear, and give in unmistakable language the grounds on which you are entitled to refuse the Holy Communion to an applicant. Do you refuse? If so, do you allege that my wife and I are 'open and notorious evil livers'? I should be reluctant to do anything which might result in a scandal, but if you refuse to answer my questions the responsibility will rest upon you.

"Yours faithfully,
"A. N. Banister."

"The Vicarage, Oct. 11, '07.

"Dear Sir,—I am as anxious as you can be that the time should not be indefinite. I will therefore intrude on the Bishop's holiday to ask if under the altered law he has other directions to give, and by the middle of next week you shall have an answer in writing to your two questions.

"Yours faithfully,
"Henry Thompson."

"Eaton Vicarage, Oct. 17, '07.

"Dear Sir,—If you choose to infer that I charge you with being a notorious and evil liver I cannot help it. The inference is your own. I have not made, nor have any idea of making, any inference of the kind. My simple reason for declining to admit you to the Lord's Table is that you knowingly and wilfully contracted a union which was declared

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The articles then proceeded as follows:—

(7.) As appears by the above correspondence, and as was the fact, the last-mentioned refusal was intended by the defendant to apply to both the promoters.

(8.) Owing to the said refusal the promoters have been and are still prevented from communicating at their said parish church, as they devoutly and humbly desire to do.

(9.) By statute 1 Edw. 6, c. 1, and by ecclesiastical law, the incumbent of a parish may not, without lawful cause, deny the holy sacrament to any parishioner that would devoutly and humbly desire it. The cause assigned by the defendant for his refusal was not a lawful cause, and the defendant in so refusing has offended against ecclesiastical law.

(10.) The offence herein charged was committed within two years of the commencement of this suit, and by reason of the letters of request herein being duly presented and accepted, and of the premises, the defendant is subject to the jurisdiction of this Court.

(11.) The defendant, having offended in manner aforesaid

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unlawful both by the Church and by the law of the land; you can therefore have no claim upon the privileges of the Church. You cannot allege that you thought what you were doing was lawful, for you went away to another country to do it. The personal correspondence must now cease, for I have nothing to add.

"Yours faithfully,
"Henry Thompson.

"P.S.—These, you understand, are the Bishop's instructions."

"Edgewood, Oct. 23, '07.

"Dear Sir,—Pressure of business has prevented my answering your letter of the 17th instant, which I duly received. I desire to point out that your letter, besides being inaccurate, does not directly answer my question, will you be good enough to give me a direct and unequivocal reply to my question, namely, If I present myself for Communion at Eaton Parish Church on the next occasion on which there is a celebration, will you or will you not administer the sacrament to me? I must ask for a definite and early reply.

"Yours, &c.,
"A. N. Banister."

"Eaton Vicarage, Oct. 24, 1907.

"Dear Sir,—I believe this formal and written refusal is what is required for the legal proceedings which I gather you intend to take.

"Yours faithfully,
Enclosure. "Henry Thompson."

"Eaton Vicarage, Oct. 24, 1907.

"Dear Sir,—If you present yourself for Holy Communion I shall certainly refuse to communicate you.

"Yours faithfully,
"Henry Thompson."

against ecclesiastical law, ought to be punished according to the gravity of his offence and the exigency of the law; and the solicitors for the promoters pray that on due proof of the premises (so far as in law shall be necessary) this honourable Court will be pleased to pronounce that the defendant has offended against the law in the particular matter herein alleged and to decree that the defendant be duly and canonically punished and convicted according to the exigency of the law, and to condemn the defendant in the costs of this suit.

The articles were admitted to proof without opposition, and on April 15 last a responsive plea was filed on behalf of the respondent, in which the several allegations in the first seven articles were admitted, save that, in respect of the allegation in the second article that the promoter A. N. Banister was of established character, the respondent denied the same so far as it was an allegation that by the marriage of August 12, 1907, referred to in the 4th article the promoter A. N. Banister did not become an evil liver within the meaning of the rubric prefixed to the order for the administration of the Holy Communion in the Book of Common Prayer, and save as to the 4th article that the respondent pleaded that the marriage referred to in that article, by reason of the affinity of the parties, was up to the time of the passing of the Deceased Wife's Sister Act, 1907, by the law of England void as being incestuous and forbidden by God's law, and that as regards the allegation in the 4th article that the said marriage was rendered valid by the Deceased Wife's Sister's Marriage Act, 1907, the respondent admitted the allegation that the said marriage is not to be deemed to have been, and is not, void or voidable as a civil contract, but not otherwise.

The responsive plea then proceeded, omitting formal articles thereof, in paragraphs 6, 7, 8, and 9, in substance, as follows:—

(6.) The solicitor for the defendant admits the allegation in the 8th article that, owing to the refusal of the defendant, the promoters have been and still are prevented from communicating at their said parish church; but he further says that when the defendant refused to administer the Holy Communion to the promoters it was notorious that E. B. Banister was the sister of the deceased wife of the promoter A. N. Banister, and it was open and notorious that since the said marriage of August 12, 1907, the promoters had been cohabiting as husband and wife.

(7.) He admits the allegation in the 9th article that by the ecclesiastical law the incumbent of a parish may not without lawful cause deny the holy sacrament to any parishioner who would devoutly and humbly desire it, but he denies the allegation in the said article that the cause assigned by the defendant for his refusal was not a lawful cause, and that the defendant in so refusing has offended against ecclesiastical law. If the cause assigned by the defendant in his letter of October 17, 1907, was not a lawful cause, such assignment did not constitute his refusal an offence against ecclesiastical law, and he submits that the article does not allege any offence against ecclesiastical law. The defendant had and has lawful cause for refusing to administer the Holy Communion to the promoters in their parish church. Such cause was as follows: By reason of such affinity, such affinity being notorious, and of their open and notorious cohabitation as husband and wife, the promoters were and are open and notorious evil livers, so that the congregation were and are thereby offended within the meaning of the rubric prefixed to the order of administration of the Lord's Supper or Holy Communion in the Book of Common Prayer.

(8.) Before the passing of the Deceased Wife's Sister's Marriage Act, 1907, no clergyman in holy orders of the Church of England would have been liable to any ecclesiastical suit, penalty, or censure for refusing to administer the Holy Communion in their parish church to a man or the sister of his deceased wife when such persons, being notoriously so related, openly and notoriously cohabited together as husband and wife, and were by reason thereof open and notorious evil livers so that the congregation were thereby offended within the meaning of the rubric prefixed to the order of administration of the Lord's Supper or Holy Communion in the Book of Common Prayer; and if the said Act had not been passed no such clergyman would now be so liable, and it is by section 1 of the said Act expressly provided that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether ecclesiastical or civil, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if the said Act had not been passed.

The responsive plea concluded with admissions of the jurisdiction of the Court if the defendant had committed the offence charged, and that the refusal to administer the Holy Communion to the promoters was within two years of the commencement of the suit, a denial that the defendant ought to be punished as alleged, and a prayer that the suit should be dismissed and the promoters condemned in costs.

The admission of the responsive plea was not opposed, and a negative issue thereto was given on behalf of the promoters, whose solicitors gave notice that no further pleadings would be entered into.

The following written admissions were subsequently made, by the consent of both the promoters and the respondent:—

On behalf of the promoters—(1.) that the fact that the promoter E. B. Banister was the sister of the deceased wife of the promoter A. N. Banister and the fact of the marriage on August 12, 1907, were known in the parish of Eaton; (2.) that it was well known in the parish of Eaton that on their return to England after their marriage the promoters lived in the parish of Eaton.

On behalf of the respondent—that the promoters were members of the Church of England, and have both been baptised and confirmed.

1908. June 26, 27. On these days the suit was heard before the Dean of the Arches (Sir Lewis T. Dibdin, D.C.L.).

No witnesses were examined.

Danckwerts, K.C., *Errington* and *Franey*, for the promoters. All the facts necessary for the decision of this case are admitted, and the sole questions before the Court are questions of law, namely, whether the promoters, having been married in Canada in 1907, before the passing of the Deceased Wife's Sister's Marriage Act, 1907, but now residing in England in the parish of which the respondent is the incumbent, are or are not entitled to partake of the sacrament of Holy Communion at the church of their parish, they having contracted a marriage to which the provisions of the last-named Act apply(1); and, if they are so entitled, whether the respondent, in repelling them from the sacrament, has committed an offence against ecclesiastical law in respect of which he ought to be prosecuted in this suit.

[THE DEAN OF THE ARCHES. I am not aware of any practice of this Court by which the parties to a suit can make written admissions otherwise than in the pleadings, and in order to support the case of the promoters there ought to be an allegation in the articles that the promoters have been confirmed.]

By consent of the counsel for the respondent the articles can, if the Court grants leave, be reformed by the insertion of the required allegation.

Both the above questions of law must be answered in favour of the promoters. As to the first question, the statute of 1 Edw. 6, c. 1, after referring to the exhortation to every man to examine himself lest he receive the sacrament unworthily, distinctly declares that the minister shall not " without lawful cause " deny the same to any person that would devoutly and humbly desire it, any law, statute, ordinance, or custom contrary thereto in any wise notwithstanding (s. 8). Now the only ground alleged for repelling the promoters in this case is their marriage within the provisions of the Deceased Wife's Sister's Marriage Act, 1907, and the circumstances attending that marriage. This alleged ground is, however, no lawful cause for refusal within the statute. A man contracts a marriage which the law of this country allows him to contract and the obligations following on which he would be compelled by that law to perform, and it would indeed be extraordinary and impossible to hold that in consequence of what he has done a lawful cause was created for repelling him from the sacrament. Equally it is impossible to hold that in other respects the same consequences as before the Act of 1907 can follow on a marriage within its provisions being contracted. Before the Act the parties to such a marriage were enjoined by the decree of the Court before which the case came to abstain from cohabitation in future: *Blackmore* v. *Brider* (1); but it is clear that such a decree could now no longer be made, and that, in case of separation taking place for reasons for which a decree of abstaining from cohabitation would have been formerly made, a suit for restitution of conjugal rights could now be rightly brought. Equally it is impossible, and indeed a terrible absurdity, to treat persons who have lawfully contracted marriages under either the Act of 1907 or the Colonial Marriages (Deceased Wife's Sister) Act, 1906, as open and notorious evil livers so that the congregation be thereby offended. There always has been a controversy in Christendom as to whether marriage with a deceased wife's sister was or was not within the prohibited degrees. It has always been an open point: 1 Cardwell, Documentary Annals (ed. 1844), p. 316; and in most countries such marriages can legally be contracted under dispensations, and marriages so contracted between parties domiciled abroad are recognized in this country, being not regarded as incestuous unless prohibited by positive law: *Re Bozzelli's Settlement* (2); *Brook* v. *Brook* (3); *Sottomayor* v. *De Barros* (4); *Hyde* v. *Hyde and Woodmansee.* (5) [They referred to 25 Hen. 8, c. 22, ss. 3 and 4; 28 Hen. 8, c. 7, s. 11; 32 Hen. 8, c. 38, s. 2, as providing that marriage with a deceased wife's sister had been declared by statute in this country to be contrary to God's law.]

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(1) The 1st section of the Deceased Wife's Sister's Marriage Act, 1907, provides in terms as follows: " No marriage heretofore or hereafter contracted between a man and his deceased wife's sister within the realm or without shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity: Provided always that no clergyman in holy orders in the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed. Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in holy orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel. Provided also that in case before the passing of this Act any such marriage shall have been annulled or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and be void upon and after the day on which it was so annulled or upon which either party thereto lawfully married another as aforesaid."

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(1) (1816) 2 Phillim. 359, 362.

(2) [1902] 1 Ch. 751.

(3) (1861) 9 H. L. Cas. 193.

(4) (1877) 3 P. D. 1. And see *Sottomayor* v. *De Barros*, (1879) 5 P. D. 94.

(5) (1866) L. R. 1 P. & M. 130.

It was only on the passing of 5 & 6 Will. 4, c. 54, that marriage with a deceased wife's sister became void instead of voidable, and it is submitted that any prohibition as to such a marriage being deemed within the prohibited degrees which resulted from that Act has been taken away by the Act of 1907.

In order to entitle a parish clergyman to repel from the sacrament any of his parishioners, it is not sufficient that the person repelled should be an open and notorious evil liver, but the congregation must be thereby offended: *Jenkins* v. *Cook*. (1) It is hardly conceivable that the congregation could be offended within the meaning of the rubric when the only evil living charged consisted in the parishioner having acted in conformity with the law as laid down in the Act of 1907. [As to the meaning of "notorious" as used in the rubric, they referred to Stephen's Notes on the Book of Common Prayer, vol. 2, pp. 1065—1072; Nicholls on the Book of Common Prayer, Additional Notes, p. 36; Canons of 1603-4, canons 26, 109; *Swayne* v. *Benson*. (2)]

The rubric providing for the rejection of open and notorious evil livers was mainly for the prevention of scandal and to secure repentance before readmission to the sacrament; in the present case, however, there could be no repentance by ceasing from cohabitation, because the parties are lawfully married.

As to the second of the questions of law arising here—namely, whether the offence against ecclesiastical law committed by the respondent is punishable—the Deceased Wife's Sister's Marriage Act, 1907, has made no alteration in the law on this point, and the respondent, if he is, as we contend, guilty of an offence against ecclesiastical law by repelling the promoters without lawful cause, must, if the offence is sufficiently proved, be condemned in this suit as he would have been if he had repelled the promoters without lawful cause before the Act of 1907 came into operation. The first proviso in the first section of

(1) (1875) L. R. 4 A. & E. 463; (1876) 1 P. D. 80.

(2) (1889) 6 Times L. R. 7.

that Act enacts, indeed, that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if the Act had not passed; but that enactment cannot refer to all clerical duties, but must, in accordance with the customary canon of construction, be confined to the duties of the clergyman, dealt with in the previous portion of the section, that is, to the duties of the clergyman in connection with the marriages referred to in the Act. If this is not so, and the proviso is construed as safeguarding the clergyman in matters not relating to the marriages in question, it would be possible for the clergyman with impunity to treat a marriage under the Act as no lawful marriage and refuse to register a child in the name of its father, or, indeed, to celebrate a bigamous marriage between one of the parties to a marriage within the Act and a third party.

It is clear that a threat to repel from the sacrament without actual repulsion, when, as in the present case, no lawful cause for so doing exists, constitutes an offence against ecclesiastical law: *Jenkins* v. *Cook.* (1) [They also referred to the following authorities: *Birtwhistle* v. *Vardill* (2); Leviticus, ch. 18; *Harris* v. *Hicks* (3); *Reg.* v. *Chadwick* (4); canons 13, 21, 28, and 107 of the Canons of 1603-4; 2 Rolle's Abridgment, Prohibition, 279; 42 & 43 Vict. c. 29; 1 Blackstone's Commentaries, book 1, ch. 15, p. 433; Rubrics in First Prayer Book of Edward VI., Second Prayer Book of Edward VI., and Prayer Book of Elizabeth.]

Talbot, K.C., and *A. B. Kempe,* for the respondent. The respondent consents to the articles being reformed by an allegation being inserted that "both the promoters have been baptized and confirmed."

Before the coming into operation of the Deceased Wife's Sister's Marriage Act, 1907, it was clearly the duty of the respondent to refuse the sacrament of Holy Communion to the promoters, they being open and notorious evil livers by reason

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(1) 1 P. D. 80, at p. 90.

(2) (1840) 7 Cl. & F. 895.

(3) (1692) 2 Salk. 548.

(4) (1847) 11 Q. B. 173.

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of their having contracted an incestuous marriage and continued cohabitation as husband and wife, and this duty still remains and has not been interfered with by any provision in that Act; and, indeed, that Act—the Deceased Wife's Sister's Marriage Act, 1907—not only does not alter the law in this respect, but has by coming into force actually strengthened the position of the respondent with regard to what he has done: The Deceased Wife's Sister's Marriage Act, s. 1, proviso 1. Marriages such as that entered into by the promoters were at the time of the first framing of the rubric in the Communion Service in the time of Edward VI. viewed with repugnance, and although such marriages were at one time subject to dispensation —Corpus Juris Canonici, Decretals, book 4, title 14, ch. 8; Sanchez, De Sancto Matrimonii Sacramento, book 7, Disputatio 65, s. 4; Corpus Juris Canonici, vol. 1, ed. 1879, p. 1435; The Institution of a Christian Man and the Necessary Doctrine of Repentance, pp. 83, 270—they were subsequently, in Henry VIII.'s reign, prohibited on the ground that they were held to be contrary to God's law: 32 Hen. 8, c. 38, preamble.

[THE DEAN OF THE ARCHES. I understood that the view amongst Roman Catholics was that a matter was only dispensable if it was not contrary to the law of God or the constitution of the Church.]

It is believed that the present view is that marriages such as those under discussion did take place before 1417, or thereabouts, when a dispensation had been granted. The result, however, since the statutes of Henry VIII. has been that these marriages are immoral by the law of the State, and Parliament has not altered, and indeed could not alter, the moral character of an act. [They referred to *Ray* v. *Sherwood*. (1)] The 5 & 6 Will. 4, c. 54, did not make marriages which had been celebrated before the passing of that Act between persons being within the prohibited degrees of affinity good and valid for all intents and purposes, and it was considered by this Court in *Ray* v. *Sherwood* (1) that the effect of that Act of Parliament was not to prohibit the Ecclesiastical Court punishing the parties to a marriage legalized by the Act for incestuous cohabitation, though the Court could not declare the marriage null and void.

(1) (1836) 1 Curt. 193, 202; (1837) 1 Moo. P. C. 353, 395, 397.

[THE DEAN OF THE ARCHES. At that time the Ecclesiastical Court had undoubted jurisdiction in causes of incest, but all suits in matters matrimonial are now, by s. 2 of 20 & 21 Vict. c. 85, to cease to be exercisable by the Ecclesiastical Court, except so far as relates to the granting of marriage licences.]

This enactment does not take away the jurisdiction of the Ecclesiastical Courts in causes of incest. [They referred to *Fenton* v. *Livingstone*. (1)] Now, this being the state of the law, and the promoters being liable to be repelled from the sacrament as open and notorious evil livers whereby the congregation have been offended, as the meaning of "notorious" is not restricted to persons "notorious" from the sentence of a competent Court, the Legislature enacts the Deceased Wife's Sister's Marriage Act, 1907, but does not in that Act alter in any way the ecclesiastical status or consequences of the marriages which the Act refers to, the Act only providing in express terms that "no marriages heretofore or hereafter contracted between a man and his deceased wife's sister within the realm or without shall be deemed to have been or shall be void or voidable '*as a civil contract*' by reason of such affinity." The use of these words "as a civil contract" shews clearly that the ecclesiastical consequences of the marriage are not interfered with. This is the obvious construction which ought to be put on the Act, especially when it is remembered that the Act applies to other marriages than those between members of the Church of England.

In the Act of 1906 relating to marriages in the Colonies—6 Edw. 7, c. 30—it is enacted that the marriages to which the Act relates shall be deemed to have always been legal for all purposes. These or similar words are not used in the Act of 1907, it is submitted, designedly; and this use of different language in the two Acts shews clearly that the view of the Legislature in passing the two Acts was different, it not being intended in the later Act to alter the existing law in relation to the ecclesiastical consequences of the marriages within the Act, and the Act not having done so. This being the state of the law at the present time, the ecclesiastical consequences of

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(1) (1859) 3 Macq. 497, 552, 560.

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the marriage contracted by the promoters remain as before the Act; one of such consequences being that they must still be considered ecclesiastically as open and notorious evil livers offending the congregation, it being sufficient that a lawful cause for their repulsion existed notwithstanding that an incorrect cause had been assigned by the respondent for their expulsion.

That the construction of the first section of the Act of 1907 adopted on behalf of the respondent, namely, that the section only legalizes the marriages within the Act as a civil contract, that is, has the effect, for example, of legitimizing the issue of such marriage, is the natural and only proper construction to be placed upon it is borne out fully, not only by the proviso in the same section freeing the clergy from all suits, penalties, and censures in consequence of the performance of the duties they had to perform before the Act, and still have to perform, unchanged since the Act and covering this case, but also by the provisions of the fourth section of the Act. (1) For the first proviso to the first section of the Act ought to be construed as applying to all the duties which the clergyman may have to perform under the existing ecclesiastical law unchanged by the Act; and it would be most extraordinary to hold that, whilst a clergyman of the Church of England is guilty of an immoral act if he contracts a marriage legalized by the Act for which he can be censured ecclesiastically under the express provisions of the fourth section, a lay member of the Church of England may be guilty of the same act without being liable to any ecclesiastical censure or discipline whatsoever. [The following additional authorities were cited: Thomas Equinas (T. de Aquino), Summa Theologica, part 3, questio 80, art. 6; Lyndwood, Provinciale, 233; Van Espin, part 2, s. 1, title 4, ch. 2, pars. 12 to 24; Canons of 1603-4, canon 57; 1 Cardwell, Synodalia, 258, 304; Corpus Juris Canonici, Decree, part 2, causa 2, qu. 1, ch. 18; Decretals, book 1, title 31, ch. 2.]

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(1) The 4th section of the Deceased Wife's Sister's Marriage Act, 1907, is in terms as follows:—

"Nothing in this Act shall relieve a clergyman in holy orders of the Church of England from any ecclesiastical censure to which he would have been liable if this Act had not been passed, by reason of his having contracted or hereafter contracting a marriage with his deceased wife's sister."

Danckwerts, K.C., in reply. The position taken up on behalf of the respondent is illogical. The Church in England is a Church by law established. It depends very much on the secular law, and cannot be regarded as a Church for the clergy only. It rather is a Church for the laity. The promoters have had secured to them a statutory and secular right to attend the service of Holy Communion in their parish church; and how can it be said that when they have obeyed the law and contracted a marriage which the law allows they are open and notorious evil livers so that the congregation are offended? This is in truth merely a fiction. Entering into such a marriage as the promoters entered into is only contracting a marriage for which a dispensation according to the opinion of all Christendom could be granted, there being nothing except the Table of Affinity to shew that marriage with a man's deceased wife's sister is a marriage within the prohibited degrees: Works of Bishop Jeremy Taylor, vol. 9, book 2, ch. 2, s. 17 et seq.; and, indeed, the position of the promoters is in reality the same as if they had received a parliamentary dispensation allowing their marriage. It could never have been the case that parties who before the Reformation had contracted a marriage for which they had obtained a dispensation could have been punished by ecclesiastical censures. [He referred to Corpus Juris Canonici, vol. 1, note to Table of Consanguinity; Decretals, book 4, title 19, ch. 8; Decree, part 2, causa 35, qu. 1, ch. 1.]

By the law of England of which the ecclesiastical law is a portion, marriage is a civil contract and nothing more, whether it be solemnized in a church or elsewhere, there being no difference in either case as to the consequences, whether ecclesiastical or civil. The Act of 1907, therefore, rightly uses the expression that no marriage within the Act shall be void or voidable "as a civil contract," and by thus enacting it secures that the consequences of such marriages, whether ecclesiastical or civil, are to be, since the Act, in all respects the same as in the case of any other legal marriage, and this whether the marriage be solemnized out of church or in church, where the blessing of God can be asked upon it.

To sum up the case of the promoters, no construction of the

Act can be the correct one, or one which the Court would support, which would entitle a clergyman to treat persons who have been living together in accordance with the law of the land as open and notorious evil livers within the rubric.

Cur. adv. vult.

1908. July 23. THE DEAN OF THE ARCHES. This is a suit under the Church Discipline Act, 1840, promoted by Alan Neville Banister and Emily Blanche Banister against the Rev. Henry Thompson, vicar of Eaton, in the diocese of Norwich, and an honorary canon of Norwich Cathedral, in respect of an ecclesiastical offence which the defendant is alleged to have committed by unlawfully repelling the promoters from Holy Communion. The suit has been brought to this Court by letters of request from the Bishop of Norwich. The facts are not in dispute. The promoters are members of the Church of England, have been confirmed, and are residents in the parish of Eaton. In August, 1907, they went to Canada—Mr. Banister being then a widower, and the other promoter being his deceased wife's sister—for the purpose of endeavouring to contract marriage, and on the 12th of that month they went through a ceremony of marriage at a Presbyterian church in Montreal. The parties were and are domiciled in England, and their attempted marriage was at the date of it null and void. Mr. Banister states that he acted under an impression that it would be valid by virtue of the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30). That Act is clearly expressed on the face of it to apply only to persons domiciled in the Colonies, and with ordinary care, which in so important a matter as marriage one would have expected to have been bestowed, that fact could not have remained unknown to him. No person competent to be consulted could have advised him otherwise, and it appears from the articles that the defendant warned him before he went to Canada of the difficulties which such a union would create in England. On August 28, 1907—i.e., sixteen days after the marriage—the Deceased Wife's Sister's Marriage Act, 1907, came into force, and by its retrospective operation validated the promoters' marriage as a civil contract. In September Mr. and Mrs. Banister returned home,

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and a correspondence then took place between Mr. Banister and the defendant as to the admission of the promoters to Holy Communion. The result of that correspondence was that the defendant, on October 24, 1907, formally and in writing informed Mr. Banister that if he and Mrs. Banister presented themselves for Holy Communion, he (the defendant) would refuse to communicate them. I think this was repulsion within the meaning of the rubric to which I shall presently refer, and it has been so treated on both sides. I think, also, that it sufficiently appears from the correspondence that the defendant's ground for repelling the promoters was both the fact and the continuance of the union contracted in the manner I have described. The latter, as involving the persistence of a particular manner of life, is for the present purpose very much the more important. The defendant appears to have treated the promoters throughout with courtesy and consideration, and to have acted, in the course he has taken, upon the advice of the bishop of the diocese, given, as I understand, privately and on general grounds. I do not gather that his lordship has instituted any proceedings of a disciplinary kind (53 Geo. 3, c. 127, s. 2) against the promoters, or that the bishop has, before advising their exclusion from Communion, either formally or informally given them an opportunity of submitting their case to him. The promoters are admitted to be persons of established position and reputation, and, except so far as their marriage may be deemed to affect the matter, of unblemished character.

By 1 & 2 Edw. 6, c. 1, s. 8, it is enacted that a clergyman "shall not without a lawful cause deny the same" (i.e., the sacrament) "to any person that will devoutly and humbly desire it." The answer to the present suit is that the defendant, by reason of the circumstances I have stated, had a lawful cause for refusal of the sacrament to the promoters, and whether that it is so or not is the question which I have to decide.

The exclusion of a member of the Christian Church from participation in the sacrament of the Lord's Supper was very early recognized as a necessary and potent weapon of ecclesiastical discipline. In the centuries which followed the apostolic age

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the penitential system developed by slow degrees into a settled organization. A member of the Church charged with sin, if he denied the charge, or if, while admitting it, he refused to submit himself to discipline, was arraigned before the bishop or the bishop's judicial delegate, and, if his guilt was established, was sentenced to excommunication—i.e., either (1.) loss of Church privileges (including that of Holy Communion) until he should make submission; or (2.), in rare cases, absolute expulsion from the Church of Christ. Exclusion from Holy Communion was part of a judicial sentence. But if the accused person admitted his wrong-doing, expressed sorrow, and asked to be admitted to the discipline of repentance, he was dealt with as a penitent. The handling of a penitent apparently soon came to be a normal part of the pastoral duty (derived from the bishop) of the priest having cure of souls in the place to which the penitent belonged. The priest had rules for his guidance, which as time went on became more elaborate. At first there was a public confession of wrong-doing and public penance in church. A series of penitential stations, or positions in church, occupied by penitents, and indicating successive stages in the process of their reconciliation, was established. The process might take weeks or months or years, according to the nature of the offence and the view of the priest, but during the whole period, whether short or long, the penitent was in a state of separation, and it was only at the end of it that he was readmitted to communion. As age succeeded age this discipline of the Christian Church slackened. Public confession and public penance were laid aside, except in rare cases of public crime. The reconciliation of the penitent became a matter between himself and his confessor. Private penance became general, and there arose the practice of redeeming and commuting penances by money payments, which at, and for a long time before, the Reformation had become a regulated and generally accepted system. But the condition precedent, which was essential to the infliction of penance, was still the submission of the penitent. Without this submission the priest could not of his own authority subject him to penance, and therefore could not exclude him from communion, until his case had been considered judicially and a sentence of excommunication

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had been formally pronounced. The Canon Law is explicit on this point:—

"Si sacerdos sciat pro certo, aliquem esse reum alicujus criminis, vel si confessus fuerit, et emendare noluerit, nisi judiciario ordine quis probare possit: Non debet eum arguere nominatim, sed indeterminate, Sicut dixit Christus, 'Unus vestrum me traditurus est.' Sed si ille, cui damnum illatum est, petierit justitiam, potest excommunicare auctorem damni, licet etiam ei confessus sit. Sed tamen non nominatim potest eum removere a communione, licet sciat eum esse reum: quia non ut judex scit, sed ut Deus: Sed debet eum admonere, ne se ingerat: quia nec Christus Judam a communione removit" (Decret. Greg. lib. 1, tit. xxxi. cap. 2).

"Placuit ut si quando episcopus dicit aliquem sibi soli proprium crimen fuisse confessum, atque ille neget, non putet ad injuriam suam episcopus pertinere, quod illi soli non creditur. Et si scrupulo propriæ conscientiæ se dicit neganti nolle communicare, quamdiu excommunicato non communicaverit suus episcopus, eidem episcopo ab aliis non communicetur episcopis, ut magis caveat episcopus, ne dicat in quemquam, quod aliis documentis convincere non potest" (ii. Decreti, Causa vi., Quest. ii. cap. 3).

The following passage from the Decretum (ii. Decreti, Causa ii., Quest. i. cap. 18) is to the same effect, and is, in fact, an extract from St. Augustine's Homily (50) de utilitate ac necessitate penitentiæ, col. 560 (ed. 1556, Basle).

"Multi corriguntur ut Petrus; multi tolerantur ut Judas; multi nesciuntur 'donec veniat Dominus, qui illuminabit abscondita tenebrarum.' *Et infra.* Nos vero a communione quemquam prohibere non possumus (quamvis hæc prohibitio nondum sit mortalis, sed medicinalis) nisi aut sponte confessum, aut in aliquo, sive seculari, sive ecclesiastico judicio nominatum atque convictum. Quis enim sibi utrumque audeat assumere, ut cuiquam ipse sit et accusator et judex?"

This being the state of things with which the compilers of our Liturgy had to deal in the sixteenth century, they proceeded on a very clearly defined principle. They asserted the liberty and the responsibility of the individual. With this view, while not

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interfering with the jurisdiction of the Church Courts to pronounce public sentence of excommunication, so far as it retained any vitality, they profoundly affected the whole system of private discipline administered by the priest in confession, by declaring it optional, and by laying far greater emphasis on the duties of self-examination and of direct confession of sin to God. The Invitation or Warning to parishioners prefixed to the "Order of the Communion" (1548—the precursor of the First Prayer Book of Edward VI.) contains these words:—

". . . . my duty is to exhort you, in the mean season, to consider the greatness of the thing, and to search and examine your own consciences. . . . . The ways and means thereto is, First, that you be truly repentant of your former evil life, and that you confess with an unfeigned heart to Almighty God . . . . promising to Him from the bottom of your hearts the amendment of your former life. And amongst all others I am commanded of God especially to move and exhort you to reconcile yourselves to your neighbours whom you have offended, or who hath offended you. . . . . And if there be any of you whose conscience is troubled and grieved in any thing, lacking comfort or counsel, let him come to me, or to some other discreet and learned priest taught in the law of God, and confess and open his sin and grief secretly, that he may receive such ghostly counsel, advice, and comfort that his conscience may be relieved, and that of us, as a minister of God and of the Church, he may receive comfort and absolution, to the satisfaction of his mind, and avoiding of all scruple and doubtfulness: requiring such as shall be satisfied with a general confession not to be offended with them that doth use, to their further satisfying, the auricular and secret confession to the Priest; nor those also which think needful or convenient for the quietness of their own consciences particularly to open their sins to the priest, to be offended with them which are satisfied with their humble confession to God, and the general confession to the Church: . . . ."

How entirely the question whether a man should communicate or not was left to his own conscience to answer is shewn by the exhortation which at the time of communion the priest was directed to "say to them which be ready to take the sacrament."

It exhorts any man who is "an open blasphemer, an advouterer, in malice, or envy, or any other notable crime, and be not truly sorry therefor," to "bewail his sins, and not come to this holy table," &c.

This appeal is followed by a rubric which begins: "Here the priest shall pause a while, to see if any man will withdraw himself," &c. Plainly, it was usually left to each individual to decide for himself whether he would abstain from communion or not.

The passages I have quoted from the "Order of the Communion" were substantially repeated in the First Prayer Book of Edward VI., and, with the omission of the actual words "auricular and secret confession," in all the subsequent Prayer Books. They are blended together in our present Prayer Book in the Exhortation or Warning to be read on the Sunday or some holy day immediately preceding a celebration.

The address at the beginning of the Commination Service, which has remained almost unchanged since the First Prayer Book of Edward VI., indicates the same reliance on a man's own conscience as the best attainable modern substitute for the primitive discipline of open penance which had been virtually superseded by the system of private penance administered in confession. It is to this effect: "Brethren, in the primitive Church there was a godly discipline, that, at the beginning of Lent, such persons as stood convicted of notorious sin were put to open penance, ... Instead whereof (until the said discipline may be restored again, which is much to be wished) it is thought good, that at this time (in the presence of you all) should be read the general sentences of God's cursing against impenitent sinners, ... To the intent that, being admonished of the great indignation of God against sinners, ye may the rather be moved to earnest and true repentance. . . . ."

But while, in the absence of a judicial sentence of excommunication, the responsibility of separating a man from communion is thus left, in the Church of England, to the voluntary action of the man himself, whose conscience is to be informed and quickened by the exhortations of the clergy, certain exceptions are made. They are contained in the rubrics prefixed to the service

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of Holy Communion. Save in one instance, to which I shall presently advert, these rubrics, for the purpose in hand, have remained practically unchanged since the First Prayer Book of Edward VI. They are as follows:—

"So many as intend to be partakers of the holy Communion shall signify their names to the Curate, at least some time the day before.

"And if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the Congregation be thereby offended; the Curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's Table, until he hath openly declared himself to have truly repented and amended his former naughty life, that the Congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do, as soon as he conveniently may.

"The same order shall the Curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's Table until he know them to be reconciled. And if one of the parties so at variance be content to forgive from the bottom of his heart all that the other hath trespassed against him, and to make amends for that he himself hath offended; and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice: the Minister in that case ought to admit the penitent person to the holy Communion, and not him that is obstinate. Provided that every Minister so repelling any, as is specified in this, or the next precedent Paragraph of this Rubrick, shall be obliged to give an account of the same to the Ordinary within fourteen days after at the farthest. And the Ordinary shall proceed against the offending person according to the Canon."

The Canons of 1603 (26, 27, and 109) repeat the prohibitions contained in the rubrics and add certain others. Churchwardens who neglect to make presentments which they have sworn to make; schismatics who openly deprave the Prayer Book and Articles; and "any that have spoken against and depraved His Majesty's sovereign authority in causes ecclesiastical," are not to be admitted by the clergy to Holy Communion, under pain of suspension.

As the present case arises directly under the rubric, which has statutory authority, it is not material to consider the legal effect of the Canons of 1603, which bind the clergy re ecclesiasticâ, but do not, of their own force, ordinarily bind the laity; or how these Canons are to be regarded in relation to a matter which gravely affects both clergy and laity.

The characteristic common to these causes for repulsion from Holy Communion, and the point to be noticed in regard to them, is that they are, one and all, intended to prevent some public mischief. The clergyman in repelling any one is not simply, or even chiefly, exercising godly discipline on the person repelled, but he is acting as a public officer for the protection of the whole community.

For the purpose of the present case it is only necessary to consider one cause of repulsion. An intending communicant who is an open and notorious evil liver, so that the congregation be thereby offended, and who has not openly declared himself to have truly repented and amended his naughty life so that the congregation may be satisfied, is not to be suffered to be a partaker of the Lord's Table. The words "open and notorious evil liver" are not precise, but I do not think they are obscure. By an evil liver is intended a person whose course of life, as distinguished from some particular action, is in conflict with the moral code of Christendom. That our law recognizes in matters of morals the common consent of Christendom is especially the case with regard to marriage questions. Thus a Mormon marriage, though contracted by persons domiciled in the Mormon State of Utah, was refused recognition in England because polygamy is inconsistent with marriage as understood in Christendom: *Hyde* v. *Hyde and Woodmansee*. (1) On the other hand, a marriage between a man and his deceased brother's widow, the parties being domiciled in Italy, and a dispensation having been obtained, was recognized in England because such marriages, though unlawful here, are not universally condemned by the general consent of Christendom: *Re Bozzelli's Settlement.* (1) "Open and notorious" means, in my opinion, that the facts which constitute the evidence of the evil living are so conspicuous and well known as to be indubitable. The word "notorious" was a technical term in Canon Law. Notoriety where it existed with regard to any fact rendered evidence in proof of that fact unnecessary (Lancelottus' Inst. Juris. Can. lib. iii. tit. xiv. cap. 39, p. 124). Three kinds of notoriety were recognized, namely, (1.) notorium juris, when a fact is proved by a judicial sentence or by an admission made in a judicial proceeding; (2.) notorium facti, when a thing is apparent to everybody, e.g., that St. Paul's Cathedral is surmounted by a dome; (3.) notorium presumptionis, when a fact is taken as established because it is presumed to be a necessary sequence from another fact not in dispute, e.g., a child born to a married woman living with her husband is presumed to be the child of the husband (Lyndwood, ed. 1679, p. 323; Icard's Prælectiones Juris Can. vol. 3, p. 177).

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(1) L. R. 1 P. & M. 130.

Some commentators on the Prayer Book have been of opinion that the word "notorious" in this rubric is to be taken as restricting the class of evil livers dealt with to those whose evil life has been proved by a sentence in the Church Court or a conviction in the secular Court: see Dr. Stephens' Prayer Book with Notes, vol. 2, p. 1062, &c.; L'Estrange's Alliance of Divine Offices, 239, &c. (ed. Library of Anglo-Catholic Theology); Nicholls's Common Prayer, Additional Notes on Communion Service, p. 36; Bishop Andrewes' Minor Works, p. 151 (ed. Library of Anglo-Catholic Theology); Bishop Wilson's Works, vol. 1, p. 462, &c. (ed. Library of Anglo-Catholic Theology). I think, however, that it is impossible to construe the word so narrowly in the Prayer Book and Canons, where it is more than once used to describe offences which, it is plain from the context, have not been the subject of legal proceedings. In this rubric in particular it is so. The final proviso which was added at the last revision of the Prayer Book (1662), in deference to the wish of the Puritans at the Savoy Conference for more effective discipline (see Cardwell's "History of the Conferences on the

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(1) [1902] 1 Ch. 751.

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Prayer Book," pp. 317, 362), requires every minister repelling a notorious evil liver to report the matter forthwith to the Ordinary, in order that proceedings may be taken against the offender under the 109th canon of 1603 for the prosecution of "notorious crimes and scandals." It cannot be that persons already, let us suppose, under sentence of the Church Courts for offences are to be presented in order that they may be punished again in the same Courts for the same offences: see Wheatly's Book of Common Prayer, ed. 1720, p. 259; ed. 1846, p. 223; Scudamore's Notitia Eucharistica, 2nd ed. pp. 40, 41. But although it is in my opinion impossible—and this was admitted at the bar—to restrict "notoriety" in the way suggested, it remains true that the class of persons as to whom a clergyman is given, not so much the power as the duty, of summary repulsion from communion on the ground of evil living, is confined within strict and narrow limits. The evil living must be what the 109th canon describes as "uncleanness and wickedness of life," that is to say, a manner of life as to the moral aspect of which, in the view of Christendom generally, there can be no doubt. It must be a course of conduct, not an isolated act. The fact that the accused is guilty of it must be so conspicuous and well known as to be not open to question. Lastly, it must be such as to cause offence to the public conscience. Before administering communion to one of his flock, it is not now, and so far as I know at no time in the history of the Church of Christ has it been, within the province of a clergyman, in the absence of voluntary submission to his pastoral authority, either to decide disputed issues of fact as to the life and doings of the intending communicant, or to settle any moot question of morals which his alleged proceedings may suggest. To permit this, St. Augustine says, would be to make the priest at once "accuser and judge." He exercises, indeed, a great and high function. He has authority to reprove, rebuke, exhort. He is to urge those under his pastoral care to examination, repentance, confession, amendment, restitution. He is to rebuke sin and to give warning of the "great peril of the unworthy receiving," of Holy Communion. The cure of souls entails this tremendous burden of spiritual power on an incumbent. But when it is discharged,

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the man who, despite all warning, intrudes himself, unrepentant and unfit, incurs an undivided responsibility, the terrible nature of which our Liturgy sets forth in solemn and impressive words.

The defendant in the present case has conceived himself bound to repel the promoters from Holy Communion on the ground that they are within the special class of persons directed by the rubric to be so repelled. Mr. Talbot, on his behalf, puts the case thus. He takes two points:—

(1.) The promoters were at the date of their repulsion, by reason of their marriage and subsequent cohabitation, open and notorious evil livers.

(2.) The Deceased Wife's Sister's Marriage Act, 1907, expressly protects a clergyman from liability in respect of action by him, which, if the Act had not been passed, would have been justifiable; if the Act had not passed, the promoters would have been persons living together matrimonially, without being husband and wife, and ought to have been repelled; therefore the defendant has incurred no liability by now repelling them.

The arguments of counsel for the defendant indicated their appreciation of the difficulty of maintaining the first point. They declined to go the full length of saying that all persons occupying the relation to one another of the promoters become, if they marry, open and notorious evil livers. It seems difficult to contend that British colonists or foreigners, lawfully married in their own country, are to be regarded as evil livers, on account of their marriage, if they come to England. It was suggested, indeed, that the condition in this respect of those the law of whose domicil permits such marriages depends on the rules of the particular religious body to which they belong. But it was urged that whatever may be said for residents in other countries or for persons resident in this country who are not members of the Church of England, the promoters being members of the Church of England, although their marriage is validated as a civil contract under the recent Act, are yet ecclesiastically open and notorious evil livers, because the rule of the Church of England expressed in the 99th Canon of 1603 brands these marriages as contrary to the laws of God. It would seem to follow if one of the parties to such a marriage were a Churchman and the other a Nonconformist, that the one might be an open and notorious evil liver and the other not. I have already indicated what in my judgment the words "open and notorious evil liver" in the rubric denote. Their significance is moral rather than ecclesiastical, and I feel the gravest doubt whether, even if there were no other considerations to be borne in mind, it would be possible to put a construction on these words which would lead to results so anomalous and extraordinary.

But this is not all. The recent Act seems to recognize a distinction between the civil and ecclesiastical aspects of marriage, and to alter the law as to the one without purporting to affect the law as to the other. This is an unusual form of enactment, and, it must be admitted, creates some difficulty for those who are concerned with its administration. If the Act had merely repealed the statutory prohibition of marriage with a deceased wife's sister—32 Hen. 8, c. 38: *Reg.* v. *Chadwick* (1)—the result so far as ecclesiastical law is concerned, would have been clear. The 99th Canon, already abrogated by force of 5 & 6 Will. 4, c. 54, with regard to legal proceedings to annul marriages within the prohibited degrees, would, so far as marriages with a deceased wife's sister are concerned, have become repugnant to statute and therefore altogether inoperative: 25 Hen. 8, c. 19, s. 3. But the apparent intention of the recent Act is, as I have stated, to alter the law in a civil sense only, so that it cannot be said to have necessarily affected the canon. I am glad that it is no part of my duty in this judgment to find answers to the many questions which may result from the state of things thus created—questions for the solution of which precedent would, I think, afford little help. With regard to the law of marriage especially, the boundaries of the respective domains of Church and State in England have neither been very strictly defined nor very consistently maintained. To some extent, to say the least, the Church has hitherto accepted the law of the State as to what, even for ecclesiastical purposes, is a good marriage.

Before Lord Hardwicke's Act (26 Geo. 2, c. 33) there were many

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(1) 11 Q. B. 173.

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irregular but valid marriages which contravened the Church's rules. For the last seventy years there have been civil and Nonconformist marriages. Notwithstanding objections raised here and there (e.g., R. Wilberforce on Church Courts, p. 66), they have not been treated as ecclesiastically void. Again, the rules made by the Church which forbade marriage between persons connected through their godparents by what was called "spiritual affinity," the ecclesiastical rules which annulled marriages of persons who had "pre-contracted" themselves in marriage, and the ecclesiastical rules which prohibited marriages of first cousins without dispensation, were all abrogated by statute (32 Hen. 8, c. 38) without even implied synodical sanction, and to this day have never been dealt with by canon. When the Canons of 1603 were enacted, these rules were treated as already swept away, and were not even mentioned. Again, marriages of persons under age, without the consent of their parents (if living), though forbidden by the 62nd and 100th Canons of 1603, and declared by Archbishop Parker, in the "Admonition" which contained his table (Cardwell's Documentary Annals, vol. 1, p. 316) to be "contrary to God's laws," were held in the Church Courts to be valid until, by Lord Hardwicke's Act, it was enacted otherwise as to marriages by licence. This Act was repealed by 4 Geo. 4, c. 76 (1823); and marriages by infants without consent, though they may create a liability to penalty, have since that date been valid. Here, then, are marriages disapproved ecclesiastically on the highest ground as "contrary to God's laws," but not regarded as ecclesiastically void. The assumption, therefore, which underlies the argument for the defence, that a marriage legalized by Act of Parliament as a civil contract necessarily remains a nullity for ecclesiastical purposes, is not justified by history and cannot be sustained. I do not go further or assume to decide affirmatively what is the exact relation of ecclesiastical law towards these marriages. My duty is confined to ascertaining whether those who have contracted such a marriage are open and notorious evil livers and are offending the public conscience by their evil life. Taking the fullest account of the limiting effect of the words of the statute, and putting at its highest the divergence which the Act may have created between the action of the State and the rule of the Church of England, I find it impossible to say that these persons, lawfully married according to the law of the land, can by any reasonable use of language be so described merely because they are living together as man and wife. I think it right, as the character and reputation of individuals are involved, to express the clear opinion at which I have arrived. It would, however, I think, be enough for the decision of this case to hold, as I do, that the promoters do not come so clearly within the prohibition of the rubric as to enable or entitle the defendant to repel them. They could only be brought within the terms of the rubric as the result of an inquiry into various questions of more or less doubt and difficulty, such as those I have considered—that is to say, an inquiry which it is, and always has been, outside the function of the parish priest to institute of his own motion and unsolicited by the parties.

I mention here, lest I should seem to have overlooked it, an argument rather pressed on me at the bar that the 4th section of the Act of 1907 compels me to regard the promoters as open and notorious evil livers. The section says that nothing in the Act shall relieve a clergyman who himself marries his deceased wife's sister from any ecclesiastical censure to which he would have been liable if the Act had not been passed. If the Act had not passed, it is said, such a clergyman would be guilty of incest. For that incest he could be prosecuted under the Clergy Discipline Act, 1892, which only deals with offences against morality. He can, therefore, still be so prosecuted for incest, and would still be guilty of immorality. But if a marriage of this sort is immoral in a clergyman, it must also be so in a layman. I confess I do not follow all the steps of this ingenious argument, but it is enough to say that until the section comes up for judicial consideration I desire to suspend my judgment as to its construction. I hesitate to accept the construction suggested so far as it seems to require that a clergyman who has contracted a lawful marriage which the law of the land would recognize and enforce should yet be liable to proceedings for incest.

I now pass to the consideration of the second point of the defence, which is a pure question of construction of the Act of

Parliament. The first proviso in the first section of the Deceased Wife's Sister's Marriage Act, 1907, is as follows: "Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed." For the purposes of this case I shall assume that a man domiciled in England living matrimonially with his sister-in-law was (notwithstanding any marriage ceremony) before the Act, and would be now but for the Act, an open and notorious evil liver who ought not to be admitted to Holy Communion. It is said that the effect of this proviso is to enable a clergyman still to repel such a person from Holy Communion. It must be taken for the purposes of this part of the case that the parties are not now open and notorious evil livers, so that but for this proviso they are persons who, in consequence of 1 & 2 Edw. 6, c. 1, s. 8, have a clear and indisputable legal right to be communicated provided they "devoutly and humbly desire it." It is a well-established rule of construction of statutes that you must not construe words so as to take away statutory rights which existed before the enactment containing the words in question was passed, unless the words plainly indicate the intention of the Legislature to take away such rights: see observations of Bowen L.J. in *In re Cuno.* (1) The proviso contains no mention of the right to receive Holy Communion, and does not in terms deprive any one of this right who, apart from the proviso, would be entitled to enjoy it. Does it do so by reason of the generality of its terms? The words of the proviso are undoubtedly very wide; but, being a proviso, it must be construed with reference to the clause to which it is appended, i.e., the first part of the section. The subject-matter of the section is marriages contracted between a man and his deceased wife's sister. The proviso under review is followed by two other provisoes, and they both relate to the actual marriage, one dealing with the use of churches for its solemnization, and the other providing for cases where such a marriage has been annulled or has been followed by lawful marriage before the passing of the Act. This suggests the inquiry whether the proviso in question can be given a reasonable meaning if restricted in the same way, namely, to the actual marriage and its incidents. I think it can. But for the proviso a clergyman would be under legal obligation to proclaim the banns of a marriage between a man and his deceased wife's sister, to solemnize the marriage, and to register it in the parish register: *Argar* v. *Holdsworth*.(1) The proviso was required and is efficient to free him from these obligations. I observe, further, that, unless some limitation is to be placed upon its apparently unrestricted terms, almost absurd consequences result. As Mr. Errington pointed out in his argument, if the clergyman may act in all respects exactly as he could have done if the Act had not been passed, he could assist a man who had married his deceased wife's sister to contract a bigamous marriage with another woman, by proclaiming his banns, solemnizing the marriage in church, and registering it, thus actively aiding and abetting in the commission of a felony. Again, after a marriage between a man and his deceased wife's sister, a clergyman might, if the construction contended for by the defendant is correct, treat the issue of the union as illegitimate and decline to recognize the father in making entries in the baptismal register, and even many years afterwards might insist on solemnizing the marriage of an infant daughter of the parties without the consent and in defiance of the objection of the father, on the ground that, the child being illegitimate, the putative father has no voice in the matter.

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(1) (1889) 43 Ch. D. 12, at p. 17.

Again, the Act contemplates that a clergyman may, though he need not, solemnize a marriage between a man and his deceased wife's sister in church with the service appointed in the Prayer Book. This service may include a celebration of Holy Communion in accordance with the rubric which states that "it is convenient that the new-married persons should receive the Holy Communion at the time of their marriage, or at the first opportunity after their marriage." But if the proviso under examination is to be construed as the defendant desires, it will be possible

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(1) (1758) 2 Lee, 515.

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for parties to be married by a clergyman and to receive the Holy Communion from him in accordance with the Act, and subsequently, on account of the marriage, to be repelled from Holy Communion by another clergyman (or by the same clergyman if he should happen to change his mind), also in accordance with the Act. It is to be noted also that these extraordinary anomalies result from a reading of the proviso in a sense which really defeats its alleged meaning. For if the defendant be now entitled by virtue of the proviso to repel the promoters, although they are not at the present time open and notorious evil livers within the meaning of the rubric, it operates to enable him to do what he could not have done before the passing of the Act, namely, to repel persons who are not open and notorious evil livers.

In my opinion, formed after anxious consideration of the Act and not without some doubt and hesitation, the general words of the proviso must be limited to the particular purpose of the section and are referable to the duties of a clergyman incident to the actual marriage.

The result is that I think the defendant has failed to justify his repulsion of the promoters from Holy Communion, and he must be admonished for having so repelled them; and, further, he must be admonished to refrain from similar acts in the future. In this Court costs usually follow the event, but having regard to the novelty and difficulty of the questions with which the defendant had to deal, and to all the circumstances of the case, I shall make no order as to costs.

I desire to add an expression of acknowledgment of the great assistance which the Court has received from counsel on both sides.

Solicitors for promoters: *Collyer-Bristow & Co.*
Solicitors for respondent: *Day & Son.*

C. F. J.

THE END.

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Referred to by Bargrave Deane J.
THE BLANCHE - - **[1908] P. 259**

—— *Joseph Thorley, Ld.* v. *Orchis Steamship Co.*, [1907] 1 K. B. 660.
Distinguished by Div. Ct. THE EUROPA - - - - - **[1908] P. 84**

—— *Kelly* v. *Kelly*, (1863) 32 L. J. (P. & M.) 181.
Not followed by Bargrave Deane J.
LESLIE *v.* LESLIE - - **[1908] P. 99**

—— *Ogden* v. *Ogden* - - [1907] P. 107
Affirmed by C. A. - - **[1908] P. 46**

—— *Rose* v. *Rose*, (1882) 7 P. D. 225; 8 P. D. 98.
Distinguished by Bargrave Deane J.
NORMAN *v.* NORMAN - **[1908] P. 6**

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—— *Simonin* v. *Mallac*, (1860) 2 Sw. & Tr. 67.
Followed by C. A. OGDEN *v.* OGDEN [**1908**] **P. 46**

—— *Sottomayor* v. *De Barros*, (1879) 5 P. D. 94.
Followed by C. A. OGDEN *v.* OGDEN [**1908**] **P. 46**

—— *University College of North Wales and University of Wales* v. *Taylor*, [1907] P. 228.
Reversed by C. A., sub nom. UNIVERSITY COLLEGE OF NORTH WALES *v.* TAYLOR - - - [**1908**] **P. 140**

—— *Upton Castle, The* - - [1906] P. 147
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—— *Weston's Settlement, In re. Neeves* v. *Weston*, [1906] 2 Ch. 620.
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COVENANT—Separation, Deed of—Covenant not to sue for any previous offence—Husband's breaches of other covenants **176**
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CRIMINAL SUIT—By letters of request—Refusal to administer the Holy Communion—Marriage with deceased wife's sister - - - - - - - **362**
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CRUELTY—Divorce.
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CUSTODY—Nullity of marriage—Lunatic—Decree—Custody of child - - **308**
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DAMAGE—Ship—Bill of lading—Damage to cargo—Seaworthiness—Negligence of shipowners' servants - - - **356**
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—— Ship—Contract of affreightment—Damage to goods—Unseaworthiness - - **84**
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DISEASES OF ANIMALS ACT—Stranded vessel—Expenses of burial - - - **292**
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DIVORCE — *Alimentary Provision for Wife—Restitution of Conjugal Rights—Decree—Non-compliance—Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68), *ss.* 2, 4—*Rights of Wife—Election—Suit for Judicial Separation—Decree therein—Waiver of alimentary Remedy under Act of* 1884—"*Alimony*," *What is—Wife's need of Support—Discretion of Court as to directing Inquiry with regard to or ordering or withholding Alimony—All the Circumstances to be considered in each Case—Refusal of Order—Practice.*

A wife, who has obtained a decree for restitution of conjugal rights, may, if the husband disobeys that decree, either apply for an alimentary provision and to have the same secured to her under the Matrimonial Causes Act, 1884, or, if she elects to petition for a judicial separation, she may apply for alimony, and, after she has obtained a decree, may ask for permanent alimony to be allotted to her; but it is not open to her, after she has elected to proceed for a judicial separation and after she has obtained a decree in that suit, to ask for an order and for security under the Act of 1884.

The question what is alimony and the practice which still guides the Court in dealing with applications for alimony are the same as were laid down in, and which guided the old Ecclesiastical Courts in considering, applications for alimony.

All the circumstances are to be considered in dealing with each particular case.

If the Court should find that the circumstances are such as shew that the wife does not require any order for alimony for her personal support in her normal position, it may refuse to direct the registrar to proceed with an expensive and harassing inquiry, or to make any order for alimony.

Kelly v. *Kelly*, (1863) 32 L. J. (P. & M.) 181, not followed. LESLIE *v.* LESLIE
Bargrave Deane J. 99

2. —— *Costs—Date of Marriage wrongly stated in Petition and Decrees—Motion to amend—Order—Practice.*

The petitioner and respondent, after having been married in a registrar's office, went through the form of marriage in a parish church. In a petition for dissolution of marriage, and in the decrees nisi and absolute pronounced thereon, the second marriage only was referred to.

Upon affidavit of service of notice of motion upon the respondent, the Court ordered that the petition and decrees be amended by inserting therein the date of the first marriage. HAMPSON *v.* HAMPSON - - **Gorell Barnes, Pres. 355**

3. —— *Costs—King's Proctor—Unsuccessful Intervention—Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2—*Petitioner's Costs to be paid by the King's Proctor—Practice.*

The Court possesses full power, in the exercise of its judicial discretion, to condemn the King's Proctor in the costs incurred by a petitioner in resisting an intervention by the King's Proctor.

The mere fact that an intervention by the King's Proctor is reasonable will not debar a successful petitioner from applying for costs.

Each application for costs is to be considered by the light of the particular case before the Court, but the general principle is that a successful petitioner, like any other litigant who succeeds, is entitled to costs unless his or her own conduct has really brought about the intervention. WESTCOTT *v.* WESTCOTT
Gorell Barnes, Pres. 250

4. —— *Deed of Separation—Covenant not to revive Suit—Subsequent Adultery by Husband—Wife's Petition for Dissolution — Cruelty and Adultery—Previous Suit for Judicial Separation on Ground of same Cruelty.*

A covenant by a wife in a deed of separation, to the effect that all proceedings in a suit which she had instituted against her husband on the ground of cruelty shall be stayed and that she "shall in no wise attempt to revive the same in any manner whatever":—

Held no bar to relief in a subsequent suit by the wife for dissolution of marriage on the ground of the husband's subsequent adultery coupled with the former cruelty.

Rose v. *Rose*, (1882) 7 P. D. 225; 8 P. D. 98, distinguished. NORMAN *v.* NORMAN.
Bargrave Deane J. 6

DIVORCE—*continued.*

5. —— *Deed of Separation—Covenant not to sue for any previous Offence — Husband's Breaches of other Covenants—Subsequent Adultery—Revival of Cruelty—Decree Nisi—Wife's Suit—Cruelty and Adultery.*

Where a deed of separation in an undefended case contained a covenant not to sue for a previous matrimonial offence, and the party whose offence had been thus condoned was shewn to have committed serious breaches of his obligations under the deed, and had in effect repudiated it, the Court held the deed not to be a bar to the right of the other party to have the marriage dissolved on grounds partly founded on the matrimonial offence committed before the date of the deed. BALCOMBE *v.* BALCOMBE **Gorell Barnes, Pres. 176**

6. —— *Domicil — Foreigner — Adultery charged in England—Alleged Adulterer a Foreigner abroad—Appearance—Dismissal from the Suit—Costs—Practice.*

Upon a husband's petition for dissolution of marriage, the alleged adulterer, who was served abroad, entered an absolute appearance, filed an affidavit stating that he was a French subject domiciled in France, and moved the Court to dismiss him from the suit.

The Court *held* that it had no jurisdiction over the applicant and dismissed him from the suit, but refused to give him his costs, inasmuch as he had entered an absolute appearance to the citation. LEVY *v.* LEVY AND DE ROMANCE **Bucknill J. 256**

7. —— *Domicil—Foreigner—Alleged Adulterer not subject to the Jurisdiction of the Court—Leave to proceed without Service of Citation or Copy Petition—Notice of Proceedings—Practice.*

A person whose name has been introduced into a divorce petition as an alleged adulterer is entitled to have notice of the proceedings so as to afford him an opportunity of clearing himself from the charge, if he should desire to do so.

The Court, in relieving a petitioner from the necessity of citing an alleged adulterer on the ground that he was a foreigner domiciled and resident out of the jurisdiction, required the petitioner to give him notice of the pending proceedings. BOGER *v.* BOGER **Bargrave Deane J. 300**

8. —— *Domicil — Irishman — Alleged Adulterer named in Petition a domiciled Irishman—Adultery in Ireland—Absolute Appearance—Subsequent Application to be dismissed from the Suit—Jurisdiction—Costs—Practice.*

Where, upon a husband's petition for divorce, the alleged adulterer is domiciled abroad, and so is not subject to the jurisdiction of the Divorce Court here, the proper practice is for the petitioner to move for leave to proceed without citing him as a co-respondent. BAKER *v.* BAKER AND DWYER - - - - - **Bucknill J. 257**

9. —— *Nullity of Marriage — Bigamy — Marriage in England between Englishwoman and Domiciled Frenchman—Irregularity by French Law—Decree of Nullity by French Court on Grounds unknown to English Law—Conflict of Laws — Lex loci contractus — Jurisdiction.*

In September, 1898, a ceremony of marriage in English form was celebrated in England between a domiciled Englishwoman and P., a domiciled Frenchman. By a decree of the French Court in November, 1901, this marriage was annulled, on the ground that the consent of the parent, as required by French law, had not been obtained. P. subsequently married a Frenchwoman in France. In July, 1903, the Englishwoman instituted a suit in England for the dissolution of her marriage with P. on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. In October, 1904, the Englishwoman went through a ceremony of marriage in England with O., a domiciled Englishman, describing herself as a widow :—

Held (following *Simonin* v. *Mallac*, (1860) 2 Sw. & Tr. 67, and *Sottomayor* v. *De Barros*, (1879) 5 P. D. 94), that the lex loci contractus must prevail, and that this later marriage was bigamous and must be annulled at the suit of O.

Decision of Bargrave Deane J., [1907] P. 107, affirmed.

Quære whether, in circumstances like the present, the Court ought not to have assumed jurisdiction in the wife's suit for the dissolution of her first marriage by treating her as having a domicil in her own country sufficient to support a suit of this kind. OGDEN *v.* OGDEN (OTHERWISE PHILIP) - - - - - **C. A. 46**

10. —— *Nullity of Marriage— Unsoundness of Mind—Delusional Insanity — Paranoia — Delusions of Suspicion— Decree — Custody of Child—Costs of the Official Solicitor as Guardian ad litem of the Respondent—Form of Order.*

Upon a petition for nullity of marriage on the ground of insanity, the question which the Court has to determine is not whether the respondent was aware that he was going through the ceremony of marriage, but whether he was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject.

The Court has to look at the nature of the alleged unsoundness of mind to see whether it is of a character which might come on suddenly, or whether it is a matter of progressive growth and development, and to ascertain whether the respondent's insanity can be traced back to an early period to such an extent as will justify the Court in coming to a conclusion that it existed before as well as after the marriage contract was entered into.

In pronouncing a decree of nullity the Court ordered that the child of the union should be given to the petitioner.

The costs of the official solicitor, as the guardian ad litem of the respondent, a person of unsound mind not so found by inquisition, were ordered to be paid by the petitioner, who was given leave to add the same to her own costs of suit, as against the respondent. JACKSON *v.* JACKSON - - - **Bargrave Deane J. 308**

DIVORCE—*continued.*

11. —— *Property of Guilty Wife—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45—*Settlement—Principles and Extent of Jurisdiction—Practice.*

The principles which should guide the Court in ordering a settlement out of the property of a guilty wife under the powers conferred by s. 45 of the Matrimonial Causes Act, 1857, are similar to those adopted in cases of variation of settlements under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), but the Court has power, under s. 45 of the Act of 1857, to deal with capital, whether in possession or reversion, as well as with income.

The Court, in ordering a settlement under s. 45, should have regard to the pecuniary position which the husband and child or children would have been in if the marriage had not been dissolved through the fault of the wife, and should endeavour, as far as may be, to adjust any alteration made in their pecuniary position by reason of the change in their circumstances due to the wife's misconduct and the consequent dissolution of the marriage. LORRIMAN *v.* LORRIMAN AND CLAIR - - - - - **Bucknill J. 282**

DOMICIL—Divorce — Costs — Domiciled Irishman—Absolute appearance - - **257**
See DIVORCE. 8.

—— Divorce — Costs — Foreigner domiciled abroad—Appearance - - - **256**
See DIVORCE. 6.

—— Divorce—Foreigner — Notice of proceedings - - - - - - - **300**
See DIVORCE. 7.

DRIFTERS' AND TRAWLERS' LIGHTS — Shipping—Collision - - - **182**
See SHIPPING. 4.

ECCLESIASTICAL LAW—*Clergy Discipline Act*, 1892 (55 *&* 56 *Vict. c.* 32), *ss.* 2, 4, 9—*Appeal on Law—Improper Admission of Evidence in Court below—Leave to appeal on Facts—Clergy Discipline Rules*, 1892, *rr.* 68, 69—*Fresh Evidence on Appeal—Discretion.*

Leave to appeal on matters of fact to the Chancery Court of York was granted by the judge of that Court in a case under the Clergy Discipline Act, 1892, where on an appeal on matters of law in the same case it had appeared that material evidence for the prosecutor which ought to have been excluded had been admitted in the Court below.

The 69th rule of the Clergy Discipline Rules, 1892, provides that the appellate Court on any appeal as to the facts under the Act may, if in the opinion of the Court the justice of the case requires it, (*a*) summon any witness heard at the trial to give evidence with respect to the case, and (*b*) order any witness not heard at the trial to give evidence with respect to the case. A defendant who had been adjudged guilty in the Consistory Court of the diocese in which he held preferment of immoral acts within the provisions of the Clergy Discipline Act, 1892, appealed to the Chancery Court of York in respect of matters of law on the ground, inter alia, of the improper admission of evidence in the Court below, and also applied in the same case for leave to appeal on matters of fact. On the appeal on matters of law being heard, the appellate Court was of opinion that certain of the evidence alleged by the appellant to have been improperly admitted ought to have been excluded, and, on the application for leave to appeal on matters of fact coming on, granted leave to appeal on fact on the ground of the improper admission of evidence in the case as above stated, and directed that under the above rule three witnesses who had given evidence in the Court below should be recalled for examination at the hearing of the appeal, and that another witness not heard in the Court below should be summoned to give evidence at the same hearing. CHESNEY *v.* NEWSHOLME; NEWSHOLME *v.* CHESNEY (2.)
Chancery Court of York 301

2. —— *Criminal Suit by Letters of Request—Church Discipline Act*, 1840 (3 *&* 4 *Vict. c.* 86), *s.* 13—*Refusal to administer the Holy Communion—Marriage with Deceased Wife's Sister—Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, *c.* 47), *s.* 1—*Persons not included under Description of "open and notorious evil liver so that the congregation be thereby offended."*

Lay members of the Church of England who have been baptised and confirmed and between whom a marriage legalized by the Deceased Wife's Sister's Marriage Act, 1907, has been solemnized are not, either by reason of such marriage or by their afterwards living together as husband and wife, open and notorious evil livers within the rubric in the Communion Service, and neither the solemnization of their marriage nor their subsequent cohabitation justifies the incumbent of the parish in which the parties reside in repelling them from the sacrament of the Lord's Supper.

A domiciled Englishman who had gone through the form of marriage with his deceased wife's sister, a domiciled Englishwoman, in a Presbyterian church in Canada, after the passing of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, but before the Deceased Wife's Sister's Marriage Act, 1907, had come into force, and after the marriage had returned to reside in England, applied, after the coming into force of the last-mentioned Act, to the incumbent of the parish in which he was residing together with his wife that, they being both members of the Church of England, and having been baptised and confirmed, should be admitted to the sacrament of the Holy Communion. The incumbent repelled the applicant and his wife from the Holy Communion, and on their promotion a criminal suit by letters of request was thereupon instituted against the incumbent:—

Held, that the promoters had been illegally repelled from the Holy Communion, and that the incumbent must be admonished for having so repelled them and to refrain from similar acts in the future. BANISTER *v.* THOMPSON
Arches Ct. of Canterbury 362

ECCLESIASTICAL LAW—*continued.*

3. —— *Faculty—Faculty for Erection of Communion Table with Cross and Candlesticks—Chancel Steps — Retable — Dorsal and Side Hangings—Chapel of Ease—Vestry.*

Circumstances in which a faculty was granted for placing a communion table, with a cross and candlesticks, in the chancel of a chapel of ease in substitution for the communion table originally placed there; the communion table to be so newly erected to be elevated on two steps above the floor of the church, and curtains to be fixed behind, and at the north and south ends of, the communion table, but not so as to prevent the minister, if so desirous, officiating in the Communion Service at the north end of the table.

Observations as to vestry meetings in faculty cases. VICAR AND CHURCHWARDENS OF WIMBLEDON *v.* EDEN. *In re* ST. MARK'S, WIMBLEDON (CHAPEL OF EASE) **Consistory Ct. of Southwark 167**

EMPLOYER AND WORKMAN—Ship—Damage—Liability for loss caused by servant's negligence - - - - - 339
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EVIDENCE—Clergy discipline—Appeal on law—Improper admission of evidence in Court below—Leave to appeal on facts
See ECCLESIASTICAL LAW. 1. 301

—— Ship—Possession—Sale—Claim to share of proceeds in Court - - - 218
See SHIPPING. 17.

EXECUTION—Testamentary papers—Execution by one person of codicil of the other person—Mistake—Intention — Effect—Refusal of probate - - - 353
See PROBATE. 3.

—— Will, Unattached papers forming—Identification—Acknowledgment and attestation - - - - - - 1
See PROBATE. 4.

FACULTY—Communion table with cross and candlesticks, Faculty for erection of—Chancel steps—Retable—Chapel of ease—Vestry - - - - - 167
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FAIRWAY—Ship—Collision—Swansea New Cut—Lights - - - - - 148
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FOREIGN ADMINISTRATOR—Full grant to—Practice—Administration—Intestacy—Limited foreign grant—Assets in England - - - - - - 108
See PROBATE. 1.

FOREIGN WATERS—Collision in — Lis alibi pendens—Service out of jurisdiction
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FOREIGNER—Divorce — Alleged adulterer a foreigner domiciled abroad—Appearance—Dismissal from the suit—Costs - 256
See DIVORCE. 6.

FOREIGNER—*continued.*

—— Divorce—Alleged adulterer not subject to the jurisdiction of the Court—Notice of proceedings - - - - - 300
See DIVORCE. 7.

FRANCE—Nullity of marriage—Bigamy—Marriage in England between Englishwoman and domiciled Frenchman—Irregularity by French law—Conflict of laws - - - - - - 46
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GRANT—Administration — Intestacy — Limited foreign grant—Assets in England—Full grant to foreign administrator - 108
See PROBATE. 1.

GUARDIAN AD LITEM—Nullity of Marriage—Lunatic—Decree—Costs of the official solicitor as guardian ad litem of the respondent—Form of order - - 308
See DIVORCE. 10.

HOLY COMMUNION—Refusal to administer—Criminal suit by letters of request—Marriage with deceased wife's sister
See ECCLESIASTICAL LAW. 2. 362

HUSBAND AND WIFE—Divorce.
See under DIVORCE.

INCORPORATION—Probate—Will and unexecuted memorandum - - - 140
See PROBATE. 2.

INFANT — Nullity of marriage — Lunatic — Decree—Custody of child - - 308
See DIVORCE. 10.

INSANITY.
See under LUNACY.

INTERNATIONAL LAW—Nullity of Marriage—Bigamy—Marriage in England between Englishwoman and domiciled Frenchman—Conflict of laws - 46
See DIVORCE.

IRELAND — Divorce — Domiciled Irishman — Adultery in Ireland—Absolute appearance—Costs - - - - - 257
See DIVORCE. 8.

JUDICIAL SEPARATION—Deed of separation—Covenant not to revive suit—Subsequent adultery by husband - - 6
See DIVORCE. 4.

—— Suit for judicial separation—Decree therein—Waiver of alimentary remedy under Act of 1884 - - - - - 99
See DIVORCE. 1.

JURISDICTION — Divorce — Alleged adulterer not subject to the jurisdiction of the Court—Notice of proceedings - 300
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JURISDICTION—*continued.*

—— Divorce—Domiciled Irishman—Adultery in Ireland—Absolute appearance—Costs
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—— Divorce—Property of guilty wife—Settlement—Principle and extent of jurisdiction - - - - - - 282
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—— Nullity of marriage—Bigamy—Marriage in England between Englishwoman and domiciled Frenchman—Conflict of laws - - - - - - 46
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—— Service out of jurisdiction—Collision in foreign waters—Lis alibi pendens 189
See SHIPPING. 6.

KING'S REGULATIONS, ch. xiv., 615 (6), (11)
See SHIPPING. 10. 269

LADING—Bill of.
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LETTERS OF REQUEST—Criminal suit by—Refusal to administer the Holy Communion—Marriage with deceased wife's sister - - - - - - 362
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LIS ALIBI PENDENS — Collision in foreign waters—Service out of jurisdiction 189
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LUNACY — Nullity of marriage — Delusional insanity—Decree—Custody of child—Costs - - - - - - 308
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MARRIAGE—Criminal suit by letters of request — Holy Communion—Refusal to administer—Marriage with deceased wife's sister - - - - - - 262
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—— Dissolution of marriage.
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—— Divorce—Date of marriage wrongly stated in petition and decrees—Motion to amend—Order - - - - 355
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—— Nullity of marriage.
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MATRIMONIAL CAUSES ACT.
See under DIVORCE.

MERCHANT SHIPPING.
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MISTAKE—Testamentary papers—Execution by one person of codicil of the other person—Intention—Effect—Refusal of probate - - - - - 353
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NEGLIGENCE—Ship—Bill of lading—Damage to cargo—Seaworthiness—Negligence of shipowners' servants - - 356
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—— Ship—Damage—Liability for loss caused by servant's negligence - - 339
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NOTICE—Divorce—Alleged adulterer not subject to the jurisdiction of the Court—Notice of proceedings - - - 300
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NULLITY OF MARRIAGE.
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PAYMENT INTO COURT — Shipping—Salvage — Payment into Court with denial of liability—Recovery of less than amount paid in - - - - 259
See SHIPPING. 19.

PILOT—Collision—Picking up pilot—" Keep her course and speed " - - - 231
See SHIPPING. 7.

POSSESSION—Ship—Sale—Claim to share of proceeds in Court—Evidence - 218
See SHIPPING. 17.

POWER OF APPOINTMENT—*Special Power of Appointment—Will—Exercise by earlier Will—No express Clause of Revocation—Complete Exercise of Power—Later Will alone admitted to Probate.*

Whether a special power of appointment has been exercised or not by will must depend, in the absence of any specific reference to the power, or the property subject to the power, upon whether it can be gathered from the terms of the will that the donee of the power had the power in mind and meant to exercise it.

The testatrix (donee of a special power of appointment) made a will by which she duly and in terms exercised such special power of appointment. In a later and holograph will executed by her were these words, " I wish to leave at my death everything I have power to will to my husband " :—

Held, that the testatrix meant to exercise and did exercise the special power by the later will, and that that will revoked the earlier will.

In re Weston's Settlement, *Neeves* v. *Weston*, [1906] 2 Ch. 620, referred to. WRIGLEY *v.* LOWNDES - - - **Gorell Barnes, Pres. 348**

PRACTICE—Divorce.
See under DIVORCE.

—— Probate.
See under PROBATE.

—— Shipping.
See under SHIPPING.

PRIVATE INTERNATIONAL LAW—Nullity of marriage—Bigamy—Marriage in England between Englishwoman and domiciled Frenchman - - - - 46
See DIVORCE. 9.

PROBATE—*Foreign Administrator—Practice—Administration—Intestacy—Limited Foreign Grant—Assets in England—Full Grant under s. 73 to Foreign Administrator.*

In a case where the Court of the domicil of a deceased person, part of whose assets consisted of personal estate in England, had made a grant of administration limited in time, this Court made, under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77), a general grant to the foreign administrator. In the Estate of Levy **Bargrave Deane J. 108**

2. —— *Incorporation—Will and unexecuted Memorandum.*

In order to admit parol evidence for the purpose of identifying a document referred to in a will and intended to be incorporated, the description of the document in the will must definitely refer to an existing document. If the will can be construed as referring to an existing or future document, parol evidence is not admissible.

Decision of Sir Gorell Barnes, President, [1907] P. 228, reversed. University College of North Wales *v.* Taylor - - **C. A. 140**

3. —— *Testamentary Papers—Execution by one Person of Codicil of the other Person—Mistake—Intention—Effect—Refusal of Probate.*

Two sisters executed codicils similar in terms. By mistake each sister executed the codicil intended for, and purporting to be, that of the other.

Upon application after the death of one of the sisters for probate of the codicil executed by her:—

Held that, the intention to execute the document propounded being wholly absent, probate must be refused in respect of the whole document, notwithstanding that it contained some testamentary dispositions which were intended by the testatrix, being, in fact, common to the two documents executed. In the Estate of Meyer - - - **Gorell Barnes, Pres. 353**

4. —— *Unattached Papers forming Will—Identification—Execution—Acknowledgment and Attestation.*

If it be clearly established by parol evidence that the pieces of paper propounded as a will were held together in some way and were so produced to the attesting witnesses and acknowledged by the testator as his will, and his signature thereon was shewn to them and declared by the testator to be his signature, the attestation of the document by the attesting witnesses in the presence of the testator renders it a duly executed will and entitles it to probate, although the pieces of paper were not attached by any mechanical fastening. Lewis *v.* Lewis **Bargrave Deane J. 1**

—— Special power of appointment—Will—Exercise by earlier will—No express clause of revocation—Later will alone admitted to probate - - - **348**
See Power of Appointment.

REMOTENESS—Shipping—Collision—Subsequent total loss—Proximate cause—Temporary repairs - - - **312**
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RESTITUTION OF CONJUGAL RIGHTS—Decree—Non-compliance—"Alimony," What is—Wife's need of support - - **99**
See Divorce. 1.

REVOCATION—Special power of appointment—Will—Exercise by earlier will—No express clause of revocation—Later will alone admitted to probate - - **348**
See Power of Appointment.

RULES OF SUPREME COURT:—**Order XI., r. 1** (*g*)—*Service out of the Jurisdiction* **189**
See Shipping. 6.

—— **Order XXII., r. 6** (*c*)—*Payment into and out of Court and tender* - - **259**
See Shipping. 19.

SALVAGE—Danger to life - - - **154**
See Shipping. 18.

—— Payment into Court with denial of liability—Recovery of less than amount paid in - - - - - **259**
See Shipping. 19.

SEPARATION—Deed of—Covenant not to revive suit—Subsequent adultery by husband **6**
See Divorce. 4.

—— Deed of separation—Covenant not to sue for any previous offence—Husband's breaches of other covenants - - **176**
See Divorce. 5.

SERVICE—Out of jurisdiction—Collision in foreign waters—Lis alibi pendens **189**
See Shipping. 6.

SETTLEMENT—Divorce—Property of guilty wife—Principles and extent of jurisdiction - - - - - **282**
See Divorce. 11.

SHIPPING—*Bill of Lading—Damage to Cargo—Seaworthiness—Negligence of Shipowners' Servants.*

A cargo of sugar was shipped at Bremen for conveyance to London under a bill of lading containing (inter alia) the following exceptions and conditions:—(1.) "all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or . . . . from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or . . . . otherwise and the owners being in no way liable for any consequences of the causes before mentioned." (2.) "It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

On the voyage the sugar was damaged by the inflow of sea water into the hold owing to the plug of a "three-way cock," fitted on the main

SHIPPING—*continued.*

bilge pipe, not having been turned so that the cock would only be open at one time in two directions, and the learned judge at the trial found as a fact that the chief engineer had not made himself acquainted with the proper adjustment of the cock in question when employed by the owners of the vessel, whilst she was being built, to superintend the fitting of the machinery :—

Held, that the defendant shipowners were liable for the damage to the sugar as their agent had not exercised reasonable care within the meaning of the second clause in the bill of lading. THE SCHWAN **Bargrave Deane J. 356**

2. —— *Collision—Crossing Rule—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, *note.*

Two steam vessels approaching one another at a combined speed of twenty knots, on nearly opposite courses, were "crossing" vessels within the meaning of art. 19 of the regulations for preventing collisions at sea, and the vessel having the other on her own starboard side, and therefore bound to give way, had just crossed the other's bows and reached, at a very short distance ahead of the other, a position of safety, green to green, when she suddenly ported. Those in charge of the vessel bound to keep her course and speed, seeing the masthead lights of the giving-way vessel coming into line, stopped and reversed ; but her stem struck the port side amidships of the giving-way vessel and sank her :—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), affirming the decision of the Court below, that the giving-way vessel was alone to blame for improper porting, and that the other vessel, finding herself in the position indicated by the note to art. 21, that is, so close that collision could not be avoided by the action of the giving-way vessel alone, had, as soon as the danger became apparent, taken such action as would best aid to avert collision.

Per Kennedy L.J. : Observations on the nature of the assistance to be rendered by nautical assessors to a Court sitting in Admiralty. THE KONING WILLEM II. - - **C. A. 125**

3. —— *Collision—Damage to Cargo—Action against Wrong-doer by Owners of Goods—C.i.f. Contract—Buyers not Owners at time of Loss—Payment of Invoice Price by Buyers—Settlement of Loss by Underwriters with Buyers—Subrogation—Right of Underwriters to recover in Name of Sellers.*

In pursuance of a contract note, providing for cost, insurance, and freight of a parcel of wood goods, the sellers in Christiania shipped the goods under a bill of lading to the order of their London agents, who forwarded it to the buyers at Exeter, and authorized them to retain it against their acceptance at four months, or cash less discount. The buyers elected to pay in cash ; but their country cheque posted to London was not credited as paid until three days after the carrying vessel had been in collision with another vessel and the goods had been damaged. The carrying vessel put into a port of distress, where the goods were sold on behalf of underwriters, with whom the sellers' agents had effected a policy for the benefit of whom it might concern. The underwriters subsequently paid the buyers as for a total loss, and the sellers retained the proceeds of the cheque representing the invoice price of the goods.

In an action of damage by collision brought against the other vessel by the owners of the goods in the carrying ship, the names of the buyers were given as plaintiffs, but the Court held that the buyers had no right of action, as the property in the goods was not vested in them at the time of the collision. By leave the names of the sellers were added as plaintiffs, and, the other vessel having been found alone to blame, the amount of the damage was referred to the registrar, who rejected the claim of the sellers suing on behalf of the underwriters on the ground that, as the sellers had been paid by the buyers the sound value of the goods, they had not sustained any loss in respect of which subrogation could arise. This report was confirmed by the judge sitting in Admiralty :—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), reversing the decision of the Court below, that the passing of the cheque from buyers to sellers did not deprive the underwriters of their right to recover the loss from the wrong-doer in the name of the sellers, who were the owners of the goods at the time of the collision. THE CHARLOTTE - **C. A. 206**

4. —— *Collision—Drifters' and Trawlers' Lights—" Under way "—Lights—Regulations for Preventing Collisions at Sea*, 1897, *art.* 9 (1906), *sub-ss.* (*b*), (*d*).

A steam drifter was fishing in the North Sea with over 2000 yards of gear out, and was exhibiting the two white lights prescribed by art. 9, sub-s. (*b*), of the regulations for preventing collisions at sea, for vessels "fishing with drift nets," when those in charge observed, upwards of a mile away, a vessel which they thought was entangled in their gear. They thereupon cast off and buoyed the nets, and steamed up to the other vessel, but so negligently manœuvred their own vessel that she was sunk in collision. The other vessel, which proved to be a steam trawler, had, prior to the collision, been trawling in one direction for an hour, then in the opposite direction for an hour, and then turned again, shooting, and hauling in, her trawl in the usual way, and all the time carrying the tri-coloured lantern required by sub-s. (*d*) of the same article, for steam vessels "when engaged in trawling." On the question of lights :—

Held by Bargrave Deane J., that the drifter had infringed the regulations, for, when she left her nets, she should have taken in her fishing lights and exhibited the lights indicated by the first paragraph of art. 9, for vessels "under way" ; whilst the steam trawler had rightly exhibited the triplex light the whole time, for she was to be deemed to be trawling, not only when she had her trawl down, but during the interval between hauling it up and shooting it again, though if she hauled up her trawl, and, instead of shooting it at once, steamed off to trawl

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over some other ground, it would then become necessary for her to exhibit "under way" lights.

The Upton Castle, [1906] P. 147, distinguished. THE COCKATRICE **Bargrave Deane J. 182**

5. —— *Collision—Fairway—Swansea New Cut—Lights—Regulations for Preventing Collisions at Sea*, 1897, *art.* 11.

A vessel lying moored at night, outside another vessel, at the customary place for trawlers loading ice, namely, the Fish Wharf, on the east side of the New Cut, Swansea Harbour, is not "at anchor" within the meaning of the first paragraph of art. 11 of the regulations for preventing collisions at sea, and, therefore, need not carry a white light; nor, at low water, is she "aground in or near a fairway" within the meaning of the same regulations, and, therefore, need not carry the two red lights mentioned in the last paragraph of those regulations. THE TURQUOISE - - - - - **Div. Ct. 148**

6. —— *Collision—Foreign Waters, Collision in—Practice—Lis alibi pendens—Service out of Jurisdiction—Rules of the Supreme Court, Order* XI., *r.* 1 (*g*).

A British ship, coming down the Elbe, came into collision with another British ship, which, in turn, came into collision with a German vessel. The agents at Hamburg of the first British ship and the owners of the German vessel exchanged letters of guarantee; but the owners of the German vessel did not commence legal proceedings in Germany against the owners of the two British ships until after the owners of the first British ship had commenced an action in personam in this country against the owners of the other British ship and the owners of the German vessel. On an application to discharge an order giving the owners of the first British ship leave—under Order XI., r. 1 (*g*), of the Rules of the Supreme Court—to serve notice of the writ on the owners of the German vessel out of the jurisdiction:—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), that the order ought not to have been made, for there had not been any unreasonable delay on the part of the owners of the German vessel in following up, by legal proceedings, the original cross letters of guarantee.

Per Farwell L.J.: Observations on the caution required in exercising the discretionary power of giving leave to serve notice of a writ on a foreigner out of the jurisdiction. THE HAGEN - - - - - - **C. A. 189**

7. —— *Collision—Picking up Pilot—"Keep her Course and Speed"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 21.

When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall, under art. 19 of the regulations for preventing collisions at sea, keep out of the way of the other, and, to enable her effectually to do so, it is provided by art. 21 that the other shall keep

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her course and speed; but the obligation, with reference to speed, incumbent upon the latter vessel, is subject to the qualification that if she is, at the material time, to the knowledge of the giving-way vessel, properly engaged in an ordinary nautical manœuvre, such as picking up a pilot, she will be entitled to carry it out, although the operation involves a reduction of speed. THE ROANOKE - - - - - - **C. A. 231**

8. —— *Collision—Reference—Offer to agree Claim—"Tender"—Costs.*

An action of damage by collision was settled on the terms that the plaintiffs should receive 60 per cent., and the defendants 40 per cent., of the amount of the damage sustained by their respective vessels; but, before the reference, the plaintiffs' solicitors wrote to the defendants' solicitors offering to agree the defendants' claim at 40 per cent. of 4500*l.* with interest. This offer the defendants declined to accept unless made in accordance with the rules as to tender. The investigation into the respective claims resulted in a small balance in favour of the plaintiffs being found due; but the registrar, in his report, although he reduced the defendants' claim below 4500*l.*, gave the defendants their costs of proving their claim on the ground that the plaintiffs' offer had not been followed up by the ordinary procedure in the case of a tender:—

Held by Bargrave Deane J., that the plaintiffs were entitled to the costs in respect of the proof of the defendants' claim subsequent to the offer by letter, as the word "tender" did not apply to the proposed agreement, which, if accepted, would have saved the expense attending the assessment of the defendants' claim. THE READING - - **Bargrave Deane J. 162**

9. —— *Collision — "Risk of Collision"— Regulations for Preventing Collisions at Sea*, 1897, *Preliminary Article to Steering and Sailing Rules, and art.* 29.

A steamship going down the river Elbe, and seeing the three lights of a steam-tug ahead or a little on her port bow, ported to give more room, thereby bringing herself well over to her proper starboard side of the channel; but the tug starboarded and got on to the starboard bow, whereupon the steamship slightly starboarded and steadied, bringing the vessels green to green at half to three-quarters of a mile and about a point and a half on the starboard bow. The tug then ported back, and, whilst crossing the bows of the steamship, was sunk in collision. The tug was found alone to blame for wrongful manœuvring without helm signals:—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), that the steamship was also to blame, for when those in charge saw that, though they had starboarded and steadied, the green light of the tug did not broaden, but was, for an appreciable time, getting finer on their starboard bow, they ought to have realized that there was "risk of collision" within the meaning of the preliminary article to the steering and sailing rules of the regulations for preventing collisions at sea, and they should,

SHIPPING—*continued.*

therefore, as a matter of seamanship under art. 29, have at once stopped and reversed.

Per Lord Alverstone C.J.: Observations on the functions of the nautical assessors in an Admiralty action. THE CITY OF BERLIN **C. A. 110**

10. —— *Collision—Single Ship and Fleet of Warships—Crossing Rule—Special Circumstances—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, 27—*King's Regulations, ch. xiv.*, 615 (6.) (11.)—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 741.

A flotilla of torpedo-boat destroyers, proceeding down the English Channel in two lines of close formation, sighted the masthead and red lights of a merchant steam vessel drawing across the head of the starboard, and approaching the port, division. When in the position of a crossing vessel with regard to the second destroyer of the port division, the officer in charge of that destroyer kept his station until danger was imminent, and then, putting his engines full speed ahead, tried by hard-a-porting to throw his starboard quarter clear, but failed to get across the bows of the merchant vessel. In an action of damage by collision :—

Held by Bucknill J., that both ships were to blame, the merchant vessel for bad look-out, whereby she got in between the two lines of the flotilla, without regard to the Board of Trade notice warning single ships to keep out of the way of a squadron of warships, and then persisted in maintaining her course and speed under art. 21 of the regulations for preventing collisions at sea, when she should have acted under art. 27, and, in the special circumstances, passed down between the two lines of the flotilla. The destroyer was also to blame, for, under the article of the King's Regulations equivalent to art. 19 of the regulations for preventing collisions at sea, it was the duty of the officer in charge, having the merchant vessel on his own starboard side, to keep out of the way, and though he was required under the King's Regulations to keep his station and not change the course, except to avoid immediate danger, and, therefore, was entitled to a reasonable time to see what the merchant vessel would do, he had, in the circumstances, delayed action too long. THE ETNA **Bucknill J. 269**

11. —— *Collision—Snow—In or approaching Falling Snow—Sound Signals—Speed—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 15, 16.

By arts. 15 and 16 of the regulations for preventing collisions at sea, a steam vessel, having way upon her, must, in falling snow, go at a moderate speed, and she must also sound, on her whistle or siren, at intervals of not more than two minutes, a prolonged blast; but these regulations do not in terms apply to a vessel approaching falling snow, and, therefore, those in charge must, in such a case, be guided by considerations of good seamanship with a view to ensure that their vessel shall be going at a moderate speed when she is herself enveloped in falling snow, and similar considerations will indicate to them the necessity, as in the analogous case of fog, of giving warning of the presence of their vessel by sounding the signal whilst in the vicinity of falling snow.

Semble, that if the vessel is, at the time she is approaching falling snow, in charge of a pilot by compulsion of law, the sounding of a signal will be a matter within his province. THE ST. PAUL - - - **Gorell Barnes, Pres. 320**

12. —— *Collision—Sound Signals — Statutory Presumption of Fault—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

A tug which, with a lighter in tow, was crossing the Humber under a slightly starboard helm on account of the ebb tide, starboarded further, and gave a long blast signal to indicate her presence to a steamship, under the stern of which she was passing. The steamship, which was shewing a stern light and lying athwart the river waiting to go into dock, came astern to allow another vessel to pass out of dock, and the tug thereupon hard-a-starboarded her helm to clear the stern of the steamship, but failed to give the appropriate two short blast signal required by art. 28 of the regulations for preventing collisions at sea as applied to the Humber. The steamship had no look-out aft, and, in the Court below, was found alone to blame for a collision with the lighter, whilst the tug was absolved from liability on the ground that the infringement of the rule could not by possibility have contributed to the collision :—

Held by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.), that the tug was also to blame, for, though those in charge of the steamship were so negligently inattentive that they did not notice what was going on astern of them, it could not be said that, if the two short blast signal had been given by the tug when further starboarding or hard-a-starboarding, as an indication that she was manœuvring for them, the signal might not have been heard and acted upon by those in charge of the steamship in time to have avoided the collision with the lighter; and, therefore, the statutory presumption of fault arose under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894. THE ARISTOCRAT - - - - - - **C. A. 9**

13. —— *Collision—Subsequent Total Loss—Proximate Cause—Temporary Repairs—Consequential Damage—Remoteness.*

The plaintiffs' steamship was so badly damaged in a collision in the English Channel with the defendants' vessel that she had to put into Portland, where she was temporarily repaired, and she then proceeded to complete her voyage to Bristol in order to deliver her cargo and earn the freight; but she sank off the Lizard. In an action of damage by collision the plaintiffs claimed to recover as for a total loss :—

Held, that though the collision was due to the negligence of those in charge of the defendants' vessel, and therefore her owners were liable for the damage sustained by the plaintiffs' steamship, they were not liable for her subsequent loss,

SHIPPING—*continued.*

as that was not the natural and reasonable result of the wrongful act of the defendants' servants, but was due to the insufficient measures taken by the plaintiffs to repair their vessel in the port of refuge, by reason of which she could not be safely navigated to her port of discharge. THE BRUXELLESVILLE - - - **Bucknill J. 312**

14. —— *Collision—Thames By-laws*, 1898, *art.* 46—*Risk of Collision.*

When two steam vessels, proceeding in opposite directions, the one up and the other down the river Thames, are approaching each other so that if they maintain their respective parallel courses they will pass starboard to starboard, but so close that any little deviation due to the effect of tide, or passing craft, or other impediment in the narrow waterway, may give rise to a position of danger, there will be "risk of collision" within the meaning of art. 46 of the Thames By-laws, and both vessels must manœuvre so as to pass port side to port side. THE GUILDHALL - - - - **C. A. 29**

15. —— *Contract of Affreightment—Ship—Damage to Goods—Unseaworthiness.*

A shipowner, whose ship is unseaworthy at the commencement of the chartered voyage, though liable in damages to the charterer, the owner of the cargo on board, for injury to the cargo caused directly for that unseaworthiness, is not liable for injury caused to other portions of the cargo, not as the result of that unseaworthiness, but by a peril of the sea excepted in the contract of affreightment; that is to say, if unseaworthiness in the carrying ship is relied on by the cargo owner, he must prove that it was the cause of the damage.

Joseph Thorley, Ld. v. *Orchis Steamship Co., Ld.*, [1907] 1 K. B. 660, distinguished. THE EUROPA - - - - - - **Div. Ct. 84**

16. —— *Negligence—Ship—Damage—Construction of Contract—Liability for Loss caused by Servant's Negligence—"Finding all Items of Transportation"—"All transporting to be at Owners' Risk."*

By a tender in writing, accepted by the plaintiffs, the defendants undertook to carry out certain repairs to the plaintiffs' vessel, and, for that purpose, to "transport vessel from berth to dry dock, finding all tugs, pilots, watermen and boats, sufficient hands for managing ship . . . . and all items of transportation to loading berth." In the margin were printed the words "all transporting to be at owners' risk."

During the transportation of the vessel at night, with the aid of one tug, from dry dock to loading berth, she got adrift from the tug, and sustained damage, owing to the parting of an alleged defective rope belonging to the ship, and to the delay caused by the thimble eye of a wire hawser, also belonging to the ship, not fitting the towing hook:—

Held by Bargrave Deane J., that the defendants were liable, for, after undertaking to find "all items of transportation," they had omitted to ascertain that the necessary items, whether belonging to the ship or not, were efficient for the purpose, and, owing to this neglect on their part, two tugs were, in the particular case, required for the safe handling of the vessel. The defendants, therefore, could not avail themselves of the marginal note as a protection against their own negligence, for the meaning of the contract, in respect of the transportation, was that, if the defendants exercised reasonable care and skill in carrying it out, the plaintiffs would incur the risks incidental to navigation. THE FORFARSHIRE - - - **Bargrave Deane J. 339**

17. —— *Possession—Ship—Sale—Claim to Share of Proceeds in Court—Evidence.*

In an Admiralty action of possession, instituted by the administratrix of the deceased registered owner of a yacht, the vessel was, by consent, sold, the proceeds paid into Court, and the question of the claims upon the fund referred to the registrar. He reported that the yacht had been bought for 1050*l.*, of which sum 550*l.* had been provided by the claimant, but that he was not satisfied that this sum had been advanced on the terms of the claimant becoming part owner. This report was confirmed by Bucknill J., and the whole of the proceeds ordered to be paid out to the administratrix:—

Held by the Court of Appeal (Lord Alverstone C.J., Farwell and Kennedy L.JJ.), that the order must be discharged, for, on proof by the claimant of the advance of a portion of the purchase-money wherewith another person had purchased the property, a presumption, which had not been displaced by any counter-evidence, had arisen in favour of the claimant, in accordance with the ordinary rule as to resulting trusts stated by Eyre C.B. in *Dyer* v. *Dyer*, (1788) 2 Cox, 92, and, therefore, the claimant was entitled to $\frac{55}{105}$ths of the proceeds of the yacht. THE VENTURE - - - - - **C. A. 218**

18. —— *Salvage—Danger to Life.*

In an action for salvage of life alone, it appeared that four tugs put out from Falmouth at night to render assistance to a large British steamship stranded off the Lizard, making signals of distress, and having on board nearly 400 passengers, 140 crew, and a valuable general cargo.

Owing to the fog prevailing, and the strong wind and heavy ground swell, caution was necessary in getting to the vessel, and, on account of the rocks, the tugs were unable to approach close to her; but at the request of the local lifeboats, which had already reached the vessel with the object of saving life, they took these boats in tow, and so enabled them, in the course of several trips, to land in safety the whole of the passengers and crew. Part of the vessel and part of her cargo were subsequently salved by other salvors:—

Held by Bucknill J., that the owners, masters, and crews of the tugs were entitled to an award of 800*l.*, for by expediting, at some risk to themselves, the transfer of the passengers from the ship to the shore, the tugs had assisted in saving life from actual, or serious apprehension of, danger. THE SUEVIC - **Bucknill J. 154**

See also No. 20, *below.*

SHIPPING—*continued.*

19. —— *Salvage — Practice — Payment into Court with Denial of Liability—Recovery of less than Amount paid in—Rules of the Supreme Court, Order* XXII., *r.* 6 (*c*)—*Costs of Issues.*

A tug, under an engagement to tow the defendants' vessel, claimed salvage for services rendered whilst the towage contract was interrupted, and a second tug, which assisted the first, besides suing for salvage, claimed compensation for damage sustained in a collision with the defendants' vessel. By their defence, the defendants did not admit that either of the plaintiff tugs had rendered any salvage service. They also set up an agreement by the second tug for 20*l.*, and alleged that any damage sustained by that tug was due to her own negligence. Finally they tendered as follows: "The defendants denying liability for more than 20*l.* part thereof for the (second tug) bring into Court 100*l.* for the (second tug) and 50*l.* for the (first tug)." The Court found that both tugs had rendered salvage services; that there was no agreement with the second tug; that the damage that tug had sustained was due to her own negligence; and that each tug was entitled to an award of 50*l.* The Court, therefore, ordered the balance of 50*l.* out of the tender to the second tug to be repaid to the defendants under Order XXII., r. 6 (*c*), of the Rules of the Supreme Court, and on the question of costs :—

Held, that the plaintiffs were entitled to their costs up to payment into Court; that the defendants were entitled to those subsequent to that date, and, in accordance with *Fitzgerald* v. *Tilling*, (1907) 96 L. T. 718, the plaintiffs were entitled to any severable costs, subsequent to payment into Court, in respect of the issues on which they had succeeded. THE BLANCHE **Bargrave Deane J. 259**

20. —— *Stranded Vessel—Part Cargo of Frozen Mutton washed Ashore—Expenses of Burial — Liability of Shipowner — Diseases of Animals Act*, 1894 (57 *&* 58 *Vict. c.* 57), *s.* 46.

A British steamship stranded off the Lizard, and from the forepart, which was left on the rocks, a large number of carcases of sheep were washed ashore. These carcases, consisting of mutton free from disease, and frozen when shipped, were buried or destroyed under the direction of the receiver of wreck, with the authority of the Board of Trade, and the expenses thereof were demanded of, and paid by, the local authority :—

Held, that the "owner of the vessel" was liable, under s. 46 of the Diseases of Animals Act, 1894, to repay to the local authority the expenses so incurred, for the words "carcase . . . . washed from any vessel," in sub-s. 2 of that section, were wide enough to include the part cargo in question which was washed ashore. THE SUEVIC - - - - **Div. Ct. 292**

SNOW—Shipping—Collision—In or approaching falling snow—Sound signals—Speed
See SHIPPING. 11. **320**

SOUND SIGNALS—Shipping—Collision—In or approaching falling snow—Speed **320**
See SHIPPING. 11.

STATUTES :—

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3 & 4 Vict. c. 86, s. 13—*Church Discipline* **362**
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41 & 42 Vict. c. 19, s. 2—*Matrimonial Causes*
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47 & 48 Vict. c. 68, ss. 2, 4—*Matrimonial Causes* - - - - - - **99**
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55 & 56 Vict. c. 32, ss. 2, 4, 9—*Clergy Discipline* - - - - - **301**
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